NO. 92-1824

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MAPCO PETROLEUM INC.
Petitioner

versus

MEMPHIS BARGE LINE, INC.
Respondent

Petition for Writ of Certiorari
to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the state courts of Tennessee lack subject matter jurisdiction to adjudicate an affirmative defense of limitation of liability under 46 U.S.C. §183, where the vessel owner previously did not timely file a complaint for limitation of liability in federal court, and where the affirmative defense has been challenged by the claimant?

(2) Whether the Supreme Court of Tennessee can refuse to follow federal court decisions which hold that the federal courts have exclusive jurisdiction over the vessel owner's defense of limitation of liability under 46 U.S.C. §183?

LIST OF INTERESTED PARTIES PURSUANT TO RULE 29.1

1. MAPCO PETROLEUM Inc.[1]

2. Memphis Barge Line, Inc.

3. Jones, Walker, Waechter, Poitevent, Carrere & Denegre (Counsel for MAPCO PETROLEUM Inc.)

4. Glankler, Brown, Gilliland, Chase, Robinson & Raines (Counsel for MAPCO PETROLEUM Inc.)

5. O'Neil, Eichin, Miller & Breckinridge (Counsel for Memphis Barge Line, Inc.)

6. Farris, Hancock, Gilman, Branan & Heller (Counsel for Memphis Barge Line, Inc.)

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[1] Pursuant to Rule 29.1, petitioner certifies that MAPCO PETROLEUM Inc. is a wholly-owned subsidiary of MAPCO Inc. MAPCO PETROLEUM Inc. has no partially-owned subsidiaries.

TABLE OF CONTENTS

Questions Presented for Review i

List of Interested Parties ii

Table of Contents iii

Table of Authorities v

Decisions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Presented for Review 1

Statement of the Case 2

Argument 4

I. The federal courts have exclusive jurisdiction to adjudicate the vessel owner's defense of limitation of liability, regardless of how the defense is asserted.

II. The consequence of federal exclusive jurisdiction: Vatican Shrimp and Cincinnati Gas---MBL forfeited its defense by not timely asserting it in federal court, since the state courts lack jurisdiction.

III. The Tennessee Supreme Court was required to follow Vatican Shrimp and Cincinnati Gas as the controlling federal maritime law.

TABLE OF CONTENTS (cont'd)

IV. The Tennessee Supreme Court's error is due to its misunderstanding of the Limitation of Liability Act and its misunderstanding of federal decisions interpreting the Act.

Conclusion 28

Certificate of Service 29

Appendix A-Opinion and Judgment of Supreme Court of Tennessee, entered February 22, 1993 ..... A-1

Appendix B-Opinion and Order of Court of Appeals of Tennessee, Western Section at Jackson, entered October 29, 1991; and Opinion on Rehearing, entered November 27, 1991 ..... B-1

Appendix C -Transcript of Oral Opinion of Circuit Court of Shelby County given June 21, 1988, and Order on Plaintiff's Motion to Strike, entered August 31, 1988 ..... C-1

Appendix D -Opinion of U.S. District Court for the Western District of Tennessee, entered September 30, 1991 ..... D-1

Appendix E -Relevant Constitutional Provisions and Statutes E-1

TABLE OF AUTHORITIES

CASES

In re Adventurent, Inc., 772 F. Supp. 1250 (M.D.Fla. 1991) 7

In re Bayview Charter Boats, Inc., 692 F.Supp. 1480 (E.D.N.Y. 1988) 5, 7, 13, 18-20

Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 9 S.Ct. 612 (1889) 8

In re Central R.R. Co. of New Jersey, 469 F.2d 857 (3d Cir. 1972) 7

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501 (1918) 21,22

Chesapeake & Ohio Rwy. Co. v. Martin, 283 U.S. 209, 51 S.Ct. 453 (1931) 23

The CHICKIE, 141 F.2d 80 (3d Cir. 1944) 8, 23

Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976), cert. denied, 429 U.S. 858 (1976) 2, 5, 7, 13-15

In re Cooper/T. Smith Stevedoring Co., 735 F.Supp. 689 (E.D.La. 1990) 7

Cooper v. Allison, 412 P.2d 356 (Ore. 1966) 5, 8

TABLE OF AUTHORITIES (cont'd)

CASES

Crowell v. Benson,
285 U.S. 22, 52 S.Ct. 285 (1932) 22

In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.,
836 F.2d 750 (2d Cir. 1988) 7

Deep Sea Tankers Ltd. v. The LONG BRANCH,
258 F.2d 757 (2d Cir. 1958) 8

Famiano v. Enyeart,
398 F.2d 661 (7th Cir. 1968) 7

Fitzgerald v. United States Lines Co.,
374 U.S. 16, 83 S.Ct. 1646 (1963) 22

Garrett v. Moore-McCormack Co.,
317 U.S. 239, 63 S.Ct. 246 (1942) 21, 22

Great Lakes Dredge & Co. v. Lynch,
173 F.2d 281 (6th Cir. 1949) 7

In re Great Lakes Transit Corp.,
63 F.2d 849 (6th Cir. 1933) 7

Ex Parte Green,
286 U.S. 437, 52 S.Ct. 602 (1932) 6, 12, 25

Guillot v. Cenac Towing Co.,
366 F.2d 898 (5th Cir. 1966) 7

TABLE OF AUTHORITIES (cont'd)

CASES

Jefferson Barracks Marine Service v. Casey,
763 F.2d 1007 (8th Cir. 1985) 7

Kattelman v. Otis Engineering Corp.,
696 F.Supp. 1111 (E.D.La. 1988) 7

Langnes v. Green,
282 U.S. 531, 51 S.Ct. 243 (1931) 6, 10-11, 25-26

The LOTTA,
150 F. 219 (D.S.C. 1907) 7

In re Luhr Brothers (M/V CHARLIE B),
765 F.Supp. 1264 (W.D.La. 1991) 7

Magnolia Marine Transport Co. v. Laplace Towing Co.,
964 F.2d 1571 (5th Cir. 1992) 7

Malone v. A. P. Mechling Barge Lines, Inc.,
380 N.E.2d 490 (Ill. App. 5th Dist. 1978) 5, 8

Metropolitan Redwood Lumber Co. v. Doe,
223 U.S. 365, 32 S.Ct. 275 (1912) 6

In re Midland Enterprises,
886 F.2d 812 (6th Cir. 1989) 7

In re MISTER WAYNE,
729 F. Supp. 1124 (E.D.La. 1989). 7

TABLE OF AUTHORITIES (cont'd)

CASES

In re North Lubec Manuf. & Can. Co.,
640 F.Supp. 636 (D.Me. 1986) 7

Norwich & New York Transp. Co. v. Wright,
80 U.S. (13 Wall.) 104, 20 L.Ed. 585 (1872) ...6, 9-10

Ohio River Co. v. Carrillo,
754 F.2d 236 (7th Cir. 1985) 7

Ohio River Co. v. City of Wheeling,
225 F.Supp. 733 (N.D.W.Va. 1964) 5, 13, 18

In re Okeanos Ocean Research Foundation, Inc.,
704 F. Supp. 412 (S.D.N.Y. 1989) 25

In re Oswego Barge Corp.,
439 F. Supp. 312 (N.D.N.Y. 1977) 7

Paladini v. Superior Court of San Francisco,
21 P.2d 941, 1933 AMC 989 (Cal. 1933) 5, 8

Pope & Talbot, Inc. v. Hawn,
346 U.S. 406, 74 S.Ct. 202 (1953) 21, 22

Providence & New York S.S. Co. v. Hill Manuf. Co.,
109 U.S. 578, 3 S.Ct. 379 (1883) 6

In re Red Star Barge Line,
160 F.2d 436 (2d Cir. 1947) 7

TABLE OF AUTHORITIES (cont'd)

CASES

Romero v. International Terminal Operating Co.,
358 U.S. 354, 79 S.Ct. 468 (1959) 22

Roth v. Cox,
210 F.2d 76 (5th Cir. 1954), aff'd, 348 U.S. 207,
75 S.Ct. 242 (1953) 21, 22

THE SCOTLAND,
105 U.S. (15 Otto) 24, 26 L.Ed. 1001 (1881) 6, 8

Signal Oil & Gas Co. v. Barge W-701,
654 F.2d 1164 (5th Cir. 1981) 8

Southern Pacific Co. v. Jensen,
244 U.S. 205, 37 S.Ct. 524 (1917) 21

Stark v. Texas Co.,
88 F.2d 182 (5th Cir. 1937) 7

In re Tropigas Carriers, Inc.,
603 F. Supp. 940 (S.D.Fl. 1985) 7

In re Two R Drilling Co.,
943 F.2d 576 (5th Cir. 1991) 6

In re United States Lines, Inc.,
616 F. Supp. 315 (S.D.N.Y. 1985) 13, 18

United States v. Reliable Transfer Co.,
421 U.S. 397, 95 S.Ct. 1708 (1975) 22

TABLE OF AUTHORITIES (cont'd)

CASES

Vatican Shrimp Co. v. Solis,
820 F.2d 674 (5th Cir. 1987), cert. denied,
484 U.S. 953 (1987) 2, 5, 7, 13, 14, 16-17

Wilburn Boat Co. v. Fireman's Fund Ins. Co.,
348 U.S. 310, 75 S.Ct. 368 (1955) 21, 22

MISCELLANEOUS

3 Benedict on Admiralty,
§3 & §51 (7th Ed. 1991) 9

Donovan, "The Origins and Development of
Limitation of Shipowners' Liability,"
53 Tul. L. Rev. 999 (1979) 8

7A Moore's Federal Practice, §F.03 (2d.Ed. 1988) ... 9, 13, 18

Schoenbaum, Admiralty and Maritime Law,
§3-13 & §14-5 (1987) 9, 13, 18

Staring, "Limitation Practice and Procedure,"
53 Tul. L. Rev. 1134 (1979) 9, 13, 18

13 Wright & Miller, Federal Practice and
Procedure, §3527 (2d Ed. 1984) 9, 13, 18

14 Wright & Miller, Federal Practice and
Procedure, §3672 (2d Ed. 1985) 9, 13, 18

DECISIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at _S.W. 2d _, 1993 W.L. 69488 (Tenn. 1993), and appears in Appendix A. The opinion of the Court of Appeals of Tennessee, Western Section at Jackson, is reported at 1991 W.L. 217509 (Tenn.App. 1991), and appears in Appendix B. The Circuit Court for Shelby County did not give written reasons for judgment, but the transcript of that court's oral opinion and its order to strike appear in Appendix C. The opinion of the U.S. District Court for the Western District of Tennessee, dismissing respondent's complaint for declaratory judgment, is not reported, but appears in Appendix D.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§1257 and 2104, and requests certiorari to review the judgment and opinion entered by the Supreme Court of Tennessee on February 22, 1993. Petitioner originally brought this general maritime law claim in the Circuit Court for Shelby County, Tennessee under the authority of the "savings to suitors" clause in 28 U.S.C. §1333(1). The Petition is timely filed in accordance with 28 U.S.C. §2101 and Rule 13.1.

CONSTITUTION PROVISIONS AND STATUTES PRESENTED FOR REVIEW

This Petition concerns the Limitation of Liability Act, 46 U.S.C. §§181-189, specifically 46 U.S.C. §183 and 46 U.S.C. §185, which provisions appear in Appendix E. The U.S. Constitution, Article III, §2 and Article VI, cl. 2, and 28 U.S.C. §1333 are also relevant to this Petition and appear in Appendix E.

STATEMENT OF THE CASE

Petitioner MAPCO PETROLEUM Inc. [hereinafter "MAPCO"] is the owner/operator of a refinery and dock facility located on the Mississippi River in Memphis, Tennessee, and respondent Memphis Barge Line, Inc. [hereinafter "MBL"] is the owner/operator of the towboat M/V SEBRING. On December 7, 1986, the M/V SEBRING and its three-barge tow struck and severely damaged MAPCO's facility. By letter dated December 8, 1986, MAPCO notified MBL of MAPCO's intention to hold MBL responsible for all damages sustained by MAPCO arising out of the casualty; in so doing, MAPCO triggered the "six month limitations period" contained in 46 U.S.C. §185 for the filing of a complaint for limitation of liability. Joint surveys of the dock damage were held, so within days of the collision, MBL knew MAPCO's damages greatly exceeded the value of MBL's interest in its vessel. However, MBL did not file a complaint for limitation of liability in federal court within six months of receiving MAPCO's letter.

Exercising its right under 28 U.S.C. §1333(1) to bring its maritime claim in state court, on September 1, 1987, MAPCO filed a complaint against MBL in the Circuit Court of Shelby County, Tennessee. In its answer, MBL asserted limitation of liability under 46 U.S.C. §183 as an affirmative defense, seeking to limit its liability to the value of the M/V SEBRING. MAPCO objected and moved to strike MBL's affirmative defense, claiming the state court lacked jurisdiction to adjudicate the vessel owner's defense of limitation of liability based on controlling federal maritime law. On June 21, 1988, the trial court granted MAPCO's motion, concluding it lacked jurisdiction to adjudicate the affirmative defense based on the federal decisions in Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976), cert. denied, 429 U.S. 858 (1976) and Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987), cert. denied, 484 U.S. 953

(1987). On August 31, 1988, the trial court ordered stricken respondent's affirmative defense.

Meanwhile, on August 28, 1988, MBL filed a complaint for declaratory judgment in the United States District Court for the Western District of Tennessee, alleging it was entitled to limitation of liability under 46 U.S.C. §183 for the damages arising out of the M/V SEBRING collision. On September 30, 1991, on motion of MAPCO, the federal court dismissed respondent's complaint on the grounds that the subject matter of the action (i.e., the vessel owner's defense of limitation of liability under 46 U.S.C. §183) was time barred. The district court entered judgment on October 7, 1991. Respondent did not take an appeal.

On December 14, 1990, in accordance with its previous findings and in accordance with a joint stipulation on liability and damages, the Circuit Court for Shelby County entered judgment in favor of MAPCO and against respondent in the amount of $905,915.02. Respondent appealed to the Tennessee Court of Appeals. Petitioner moved to dismiss that appeal for lack of subject matter jurisdiction, but the state appellate court dismissed the motion.

On October 29, 1991, the Tennessee Court of Appeals modified the judgment of the trial court and remanded with instructions for the trial court to determine whether MAPCO's objection to MBL's affirmative defense had any nonfrivolous basis in fact on the substantive merits before deciding the jurisdictional challenge to that defense. Although conceding that federal court decisions held state courts lacked subject matter jurisdiction to adjudicate the defense, the appellate court concluded that striking the defense would leave MBL without a forum, so the appellate court held MAPCO was required to show in the trial court that it had a nonfrivolous challenge to the defense on its merits before its jurisdictional challenge could be considered. The appellate court denied rehearing on November 27, 1991.

Petitioner and respondent both appealed to the Supreme Court of Tennessee. On February 22, 1993, the Supreme Court of Tennessee reversed the judgment of the Court of Appeals and reversed the judgment of the trial court, and held that the state courts of Tennessee have jurisdiction to adjudicate the vessel owner's defense of limitation of liability under 46 U.S.C. §183 when it is asserted as an affirmative defense; the Tennessee Supreme Court remanded the case back to the Circuit Court for Shelby County for trial on the merits of MBL's affirmative defense. The Tennessee Supreme Court reasoned that state courts lack subject matter jurisdiction over the defense of limited liability under 46 U.S.C. §183 only when the vessel owner files a complaint for limitation of liability in federal court, and since MBL had not done so in this case, the Tennessee Supreme Court concluded that the state courts of Tennessee were not deprived of jurisdiction to adjudicate the defense. In so holding, the Tennessee Supreme Court refused to follow numerous federal court decisions interpreting the Limitation of Liability Act as falling within the exclusive jurisdiction of the federal courts, and opted instead for its own interpretation of the federal statute.

Petitioner seeks a writ of certiorari to reverse the judgment of the Supreme Court of Tennessee, for that court's decision is contrary to the decisions of this Court and other federal courts holding that (1) the federal courts have exclusive jurisdiction to adjudicate the defense of limitation of liability, and (2) the state courts lack jurisdiction to adjudicate the defense if the defense is challenged by a claimant.

ARGUMENT

The decision of the Tennessee Supreme Court is absolutely contrary to established and controlling principles of federal maritime law, and the decision destroys the uniformity of law which is so necessary and fundamental to the framework of

maritime law in this country. Therefore, pursuant to Supreme Court Rule 10(b) and (c), petitioner submits a writ of certiorari should issue for the following reasons:

1. The Supreme Court of Tennessee's decision is in direct conflict with the decisions of the following United States Courts of Appeal:

> Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987), cert. denied, 484 U.S. 953 (1987)
>
> Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976), cert. denied, 429 U.S. 858 (1976)
>
> See In re Bayview Charter Boats, Inc., 692 F.Supp. 1480 (E.D.N.Y. 1988), and Ohio River Co. v. City of Wheeling, 225 F.Supp. 733 (N.D.W.Va. 1964)

2. The Supreme Court of Tennessee's decision is in direct conflict with the decisions of the following state courts of last resort:

> Cooper v. Allison, 412 P.2d 356 (Ore. 1966)
>
> Paladini v. Superior Court of San Francisco, 21 P.2d 941, 1933 AMC 989 (Cal. 1933)
>
> See Malone v. A. P. Mechling Barge Lines, Inc., 380 N.E.2d 490 (Ill. App. 5th Dist. 1978)

3. The Supreme Court of Tennessee's decision is in direct conflict with the following decisions of the U.S. Supreme Court, which hold that the federal district courts have exclusive jurisdic-

tion to adjudicate the law of limitation of liability as provided in 46 U.S.C. §183:

> Norwich & New York Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104, 20 L.Ed. 585 (1872)
>
> Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243 (1931)
>
> Ex Parte Green, 286 U.S. 437, 52 S.Ct. 602 (1932)

I. The federal courts have exclusive jurisdiction to adjudicate the vessel owner's defense of limitation of liability, regardless of how the defense is asserted.

This rule of federal jurisdiction is a well-settled principle of maritime law, for the federal courts at all levels have repeatedly, consistently and emphatically stated that the federal courts have exclusive jurisdiction over all issues relating to limitation of liability under 46 U.S.C. §183, regardless of how that defense is asserted.[1]

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[1] U.S. Supreme Court: Norwich & New York Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104, 123-24 & 125-26, 20 L.Ed. 585, 592-93 (1872); Langnes v. Green, 282 U.S. 531, 539-40, 51 S.Ct. 243, 246-47 (1931); Ex Parte Green, 286 U.S. 437, 439-40, 52 S.Ct. 602, 603 (1932); Metropolitan Redwood Lumber Co. v. Doe, 223 U.S. 365, 32 S.Ct. 275, 276 (1912); Providence & New York S.S. Co. v. Hill Manufacturing Co., 109 U.S. 578, 588, 3 S.Ct. 379, 385 (1883). See THE SCOTLAND, 105 U.S. (15 Otto) 24, 26 L.Ed. 1001 (1881).

U.S. Circuit Courts of Appeal: In re Two R Drilling Co., 943 F.2d 576, 578 (5th Cir. 1991); Magnolia Marine Transport Co. v. Laplace

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Jurisdiction in the federal courts is exclusive regardless of whether the defense is asserted in a complaint for limitation of liability or whether it is asserted as an affirmative defense in an answer. The vessel owner's defense of limitation of liability is not a remedy which was preserved ("saved") to suitors at

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[1] continued

Towing Co., 964 F.2d 1571, 1575 (5th Cir. 1992);In re Midland Enterprises, 886 F.2d 812, 813-14 (6th Cir. 1989); Vatican Shrimp Co. v. Solis, 820 F.2d 674, 677-79 (5th Cir. 1987); Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001, 1005 (6th Cir. 1976); In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 754 (2d Cir. 1988); Ohio River Co. v. Carrillo, 754 F.2d 236, 238 (7th Cir. 1985); Jefferson Barracks Marine Service v. Casey, 763 F.2d 1007, 1009-10 (8th Cir. 1985); In re Central R.R. Co. of New Jersey, 469 F.2d 857, 861 (3d Cir. 1972); Famiano v. Enyeart, 398 F.2d 661, 663 (7th Cir. 1968); Guillot v.Cenac Towing Co., 366 F.2d 898, 904 (5th Cir. 1966); Great Lakes Dredge & Co. v. Lynch, 173 F.2d 281, 284 (6th Cir. 1949); In re Red Star Barge Line, 160 F.2d 436, 437-38 (2d Cir. 1947); Stark v. Texas Co., 88 F.2d 182, 183 (5th Cir. 1937); In re Great Lakes Transit Corp., 63 F.2d 849, 850-51 (6th Cir. 1933).

U.S. District Courts: In re Luhr Bros. (M/V CHARLIE B), 765 F.Supp. 1264, 1267 (W.D.La. 1991); In re Adventurent, Inc., 772 F.Supp. 1250, 1252 (M.D.Fla. 1991); In re Cooper/T. Smith Stevedoring Co., 735 F.Supp. 689, 690 (E.D.La. 1990); Kattelman v. Otis Engineering Corp., 696 F.Supp. 1111, 1113 (E.D.La. 1988); In re Bayview Charter Boats, Inc., 692 F.Supp. 1480, 1486 (E.D.N.Y. 1988); In re North Lubec Manuf. and Can. Co., 640 F.Supp. 636, 638-40 (D.Me. 1986); In re Tropigas Carriers, Inc., 603 F.Supp. 940, 941 (S.D.Fl. 1985); In re MISTER WAYNE, 729 F.Supp. 1124, 1126 & 1129 (E.D.La. 1989); In re Oswego Barge Corp., 439 F.Supp. 312, 319 (N.D.N.Y. 1977); The LOTTA, 150 F. 219, 223-24 (D.S.C. 1907).

common law; rather it is a statutory right created by Congress.[2] In §185 of the Limitation of Liability Act, Congress has expressly stated that the vessel owner must assert the right in a federal court; nowhere else in the Act has Congress set forth the procedure to invoke the defense,[3] and certainly nowhere in the Act has Congress expressed or intimated that the defense may be asserted in a state forum. Neither Congress nor the U.S. Supreme Court nor the U.S. circuit courts of appeal and district courts have ever authorized state courts to adjudicate the federal statutory defense of limited liability. Moreover, the state courts which have properly considered this question have concluded that jurisdiction to adjudicate the defense under 46 U.S.C. §183 is exclusively in the federal courts, such that state courts lack jurisdiction to adjudicate the defense if challenged by a claimant.[4] Furthermore, the admiralty commentators agree that jurisdiction to adjudicate the defense of limited liability is exclusively

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[2] Act of March 3, 1851, ch. 43, 9 Stat. 635. Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 556-57, 9 S.Ct. 612, 618-19 (1889). See Donovan, "The Origins and Development of Limitation of Shipowners' Liability," 53 Tul. L. Rev. 999, 1027-28 (1979).

[3] The Supreme Court, not Congress, has authorized an additional procedure, whereby the vessel owner can assert the right as an affirmative defense in its answer, but provided the claimant's suit has been filed in a federal court. See The SCOTLAND, 105 U.S. (15 Otto) 24, 26 L.Ed. 1001, 1004 (1881); The CHICKIE, 141 F.2d 80, 84-85 (3d Cir. 1944); Deep Sea Tankers Ltd. v. The LONG BRANCH, 258 F.2d 757, 772-72 (2d Cir. 1958); Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164, 1173 (5th Cir. 1981).

[4] See Cooper v. Allison, 412 P.2d 356, 358 (Ore. 1966); Paladini v. Superior Court of San Francisco, 21 P.2d 941, 943, 933 AMC 989, 993 (Cal. 1933); Malone v. A.P. Mechling Barge Lines, Inc., 380 N.E. 2d 490, 502 (Ill.App. 5th Dist. 1978).

in the federal courts.[5]

This rule of federal exclusive jurisdiction has its origin in three early U.S. Supreme Court cases. In Norwich & New York Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104, 20 L.Ed. 243 (1872), the Supreme Court recognized that the federal district courts, in the exercise of their admiralty jurisdiction, had exclusive jurisdiction to adjudicate the law of limitation of liability as provided in the federal statute:

> The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take "the appropriate proceedings in any court, for the purpose of apportioning the sum for which, etc." Now, no court is better adapted than a court of admiralty to administer precisely such relief. . . . It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. . . . We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding.

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[5] 3 Benedict on Admiralty, §3 pp. 1-30 & 1-31, §51 pp. 6-2 & 6-3 (7th Ed. 1991); 7A Moore's Federal Practice, §F.03, pp. F30-F44 (2d Ed. 1988); 14 Wright & Miller, Federal Practice and Procedure, §3672, p. 448 n. 51 (2d Ed. 1985); 13 Wright & Miller, Federal Practice and Procedure, 3527, p. 244 (2d Ed. 1984); Schoenbaum, Admiralty and Maritime Law, §3-13, p. 117 & §14-5, pp. 487-89 (1987); Staring, "Limitation Practice and Procedure," 53 Tul. L. Rev. 1134, 1138 (1979).

80 U.S. at 123-24, 20 L.Ed. at 592.

> . . . If an action should be brought in a state court, the shipowner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court or procure an order from the district court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. . . . The difficulty with the respondents in this case is, that they have not taken the proper steps, in the proper court, to enable them to avail themselves of the benefit of the Act. . . .

80 U.S. at 125-126, 20 L.Ed. at 592-93.

Thereafter, in Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243 (1931) and again in Ex Parte Green, 286 U.S. 437, 52 S.Ct. 602 (1932),the Supreme Court emphatically held the federal district courts had exclusive jurisdiction over limitation of liability and held state courts lacked jurisdiction to adjudicate the defense if it were contested by a claimant. In Langnes v. Green, this Court stated:

> . . . That the action brought in the state court was authorized by the first of the statutes referred to is plain. That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear. The situation, then, is that one statute gave

> respondent the right to a common law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek a limitation of liability in the federal district court. Needless to say, that, if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive, and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted.

282 U.S. at 539-450, 51 S.Ct. at 246.

> . . . To retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the District Court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume

> such form in that court as to bring it within the exclusive power of a court of admiralty.

282 U.S. at 541-542, 51 S.Ct. at 247.

This Court again stated in Ex Parte Green that jurisdiction over the Limitation of Liability Act was exclusive in the federal courts:

> It is clear from our opinion [in Langnes v. Green] that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that, if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.

286 U.S. at 439-440, 52 S.Ct. at 603.

This Court has never held that state courts share jurisdiction with the federal courts to adjudicate issues pertaining to the Limitation of Liability Act. This Court has never held that jurisdiction over limitation of liability is exclusive only when and where it is asserted through a complaint for limitation of liability under 46 U.S.C. §185. This Court has never held that the defense of limitation of liability could be adjudicated in a state court if it is asserted as an affirmative defense in the answer. Jurisdiction to adjudicate any issue pertaining to limitation of liability under the Act is exclusive in the federal courts, and so the defense cannot be asserted in a state court proceeding, either by way of complaint or by way of answer, since state courts lack jurisdiction to adjudicate the defense.

Notwithstanding this clear and entrenched principle of exclusive federal jurisdiction, the Tennessee Supreme Court

choose to ignore federal law and apply its own view of the Limitation of Liability Act. This Court should issue a writ of certiorari to correct the clear error of the Tennessee court.

II. The consequence of federal exclusive jurisdiction: Vatican Shrimp and Cincinnati Gas---MBL forfeited its defense by not timely asserting it in federal court, since the state courts lack jurisdiction.

Since jurisdiction is exclusive in the federal courts, the state courts lack jurisdiction to adjudicate the defense of limited liability, and so that defense cannot be asserted in a state court proceeding. Therefore, if the vessel owner does not timely file a complaint for limitation of liability in federal court, then the vessel owner completely forfeits his defense of limited liability should the claimant choose to file suit against the vessel owner in state court.[6]

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[6] Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987); Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976); In re Bayview Charter Boats, Inc., 692 F.Supp. 1480 (E.D.N.Y. 1988); In re United States Lines, Inc., 616 F.Supp. 315 (S.D.N.Y. 1985); Ohio River Co. v. City of Wheeling, 225 F.Supp. 733 (N.D.W. Va. 1964). Accord, Schoenbaum, Admiralty & Maritime Law, §3-13, p. 117 & §14-5, pp. 487-89 (1987); 14 Wright & Miller, Federal Practice and Procedure, §3672, p. 448 n. 51 (2d Ed. 1985); 13 Wright & Miller, Federal Practice and Procedure, §3527, p. 244 (2d Ed. 1984); 7A Moore's Federal Practice, §F.03, pp. F30-F32 (2d Ed. 1988); Staring, "Limitation Practice and Procedure," 53 Tul. L. Rev. 1134, 1138-41 (1979).

The precise question whether a vessel owner can raise limitation of liability in a state court proceeding where he previously failed to timely file a complaint for limitation of liability in federal court was squarely addressed and resoundly answered in the negative by the federal courts of appeal in Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976), cert. denied, 429 U.S. 858 (1976) and in Vatican Shrimp v. Solis, 820 F.2d 674 (5th Cir. 1987), cert. denied, 484 U.S. 953 (1987). In Cincinnati Gas & Electric Co. v. Abel, the Sixth Circuit held the vessel owner could not plead limitation of liability as an affirmative defense in state court, because the state court lacked jurisdiction to adjudicate the defense if challenged by the claimant:

> . . . Regardless of how the procedure is described, the fact remains that the state court lost jurisdiction of the limitation of liability issue when the claimant contested the owner's right to avail itself of limitation and only an admiralty court had jurisdiction to decide the issue. . . .
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> . . . When a shipowner is faced with a claim or claims in excess of the value of his vessel, the prudent thing for him to do is to file a protective petition in the proper federal court pursuant to §185. . . . Prior to the adoption of the 1936 amendments, it was not necessary to anticipate the possibility of the claims exceeding the value of the vessel; it was sufficient to raise the issue after judgment. Now, however, an owner who receives a notice of a claim acts at his peril if he fails to file a petition for limitation in a federal court within six months. Having done this, if he is then sued in the district court, he can move for a consolidation of the petition for limitation with the damage action.

> The procedure which the Supreme Court described in Langnes v. Green, modified to reflect the six-month provision of §185, remains the preferred way of dealing with a contested issue of limitation where the case has originated in a state court. At the time the owner files a petition under §185, he may make a motion to stay proceedings on his petition until it is determined whether it will be necessary to decide the limitation question. If the right to limitation is not contested in the state court and a final judgment is entered there without the necessity of litigating the limitation issue, the §185 proceedings in the district court can then be dismissed.
>
> Since the purpose of amending §185 was to cut down the right of a shipowner to limit his liability, the time limit imposed by the amendment should be strictly enforced. Any ambiguity in the amended version of the Limited Liability Act should be resolved in favor of permitting full recoveries and required strict adherence to the statutory requisites for limiting liability. Knowing of previous decisions permitting the right to limited liability to be raised by answer in state court proceedings, Congress could have provided for the continuance of this procedure with a reasonable time limit. However, both the amendment to §185 and Rule F require that a petition be filed in a district court of the United States. Failure to so file within six months of written notice of a claim deprives the vessel owner of the benefits of limitation of liability.

533 F.2d at 1005-1006.

In Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987), the Fifth Circuit held the state courts are powerless and without jurisdiction to entertain the defense of limited liability, since federal district courts have exclusive jurisdiction to adjudicate that defense. The court held squarely against the vessel owner, based on the Supreme Court's decisions in Langnes v. Green and Ex Parte Green:

> We hold that on the facts of the case now before us, Vatican Shrimp's Section 185 petition was untimely, and Vatican Shrimp's defensive pleading in the state court answer did not provide the federal court with jurisdiction to hear the shipowner's limitation claim.

820 F.2d at 677. The Fifth Circuit stated that the vessel owner could preserve his defensive right only by timely filing a complaint for limitation of liability in federal court, otherwise that right was lost should the maritime claimant pursue his claim in state court:

> . . . However, if a shipowner is sued in state court, the owner's failure to file a Section 185 petition in a federal district court within six months after receiving written notice of the claim will result in forfeiture of the right to limit liability should the claimant contest the limitation defense. This is so because solely filing in the state court an answer in which limitation is plead obviously does not provide a federal court with jurisdiction to act. . . .

820 F.2d at 678 (emphasis added).

> Applying the modified Langnes procedure to the facts of this case, we have determined that Vatican

> Shrimp had notice of the claim at the very latest upon the service of the state court complaint in October, 1984, thus commencing the six-month time period in §185, which inarguably begins to run from the shipowner's receipt of written notice of the claim. Vatican Shrimp, however, failed to file its second 185 petition until April 18, 1986, approximately one and one-half years after its receipt of written notice. There is no question that Vatican Shrimp failed to comply with the six-month time limit. Its defensive pleading of limitation in the state court answer did not toll the six-month filing period under §185; nor did the state court answer provide the federal court with jurisdiction to hear the limitation claim. The district court therefore correctly dismissed the §185 petition as untimely.

820 F.2d at 679.

> . . . We are not insensitive to the economic burdens that will be placed on small-vessel owners. Notwithstanding our concern over these added economic burdens, we are unable to reach a different legal conclusion without violating the precedent of many years that control us. First, we are unable to find any precedent holding that state courts have jurisdiction to adjudicate a contested limitation of liability defense; nor does any authority indicate that state courts ever had such jurisdiction; nor is there any authority that the 1936 amendments granted such jurisdiction to state courts; nor have any courts since the 1936 amendments suggested that state courts do have such jurisdiction. More-

> over, the United States Supreme Court has expressly held in the Green cases, Langnes v. Green; Ex parte Green, albeit decided before the 1936 amendments to the Act, that once the vessel owner's right to limit liability is contested, the cause becomes exclusively cognizable in a federal court of admiralty.

820 F.2d at 681-682.

The "rule" in Cincinnati Gas and Vatican Shrimp is quite clear: the vessel owner who does not timely file a complaint in federal court forfeits any right to limitation of liability if the claimant files suit in state court, for the state court lacks jurisdiction to adjudicate that defense if challenged by the claimant.[7]

However, Cincinnati Gas and Vatican Shrimp are not the only federal decisions which illustrate the consequences which befall the vessel owner who fails to timely preserve in federal court his defense of limitation of liability, when a claimant files suit in state court. In In re Bayview Charter Boats Inc., 692 F. Supp. 1480 (E.D.N.Y. 1988), the claimants filed suit in state court, and the defendant vessel owner did not file its petition for limitation of liability in federal court until after the expiration of the §185 six-month time limit. The district court dismissed the

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[7] Accord, 7A Moore's Federal Practice, §F.03, pp. F30-F32 (2d ed. 1988); Schoenbaum, Admiralty and Maritime Law, §3-13, p. 117 & §14-5, pp. 487-89 (1987); 14 Wright & Miller, Federal Practice and Procedure, §3672, p. 448 n. 51 (2d ed. 1985); 13 Wright & Miller, Federal Practice and Procedure, §3527, p. 244 (2d ed. 1984); Staring, "Limitation Practice and Procedure," 53 Tul. L. Rev. 1134, 1138-1141 (1979). See In re United States Lines, Inc., 616 F.Supp. 315 (S.D.N.Y. 1985); Ohio River Co. v. City of Wheeling, 225 F.Supp. 733 (N.D.W.Va. 1964).

defendant's petition as untimely and noted that the vessel owner was without any defense of limitation of liability whatsoever insofar as the state court lawsuit was concerned:

> . . . The Court holds that Bayview's petition was not filed within six months of the owner's receipt of notice of the Russo's claim. Accordingly, the petition must be dismissed as untimely. The dismissal of Bayview's petition, coupled with the fact that claimants have invoked the jurisdiction of the state court to decide their liability claims against Bayview, deprives this Court of jurisdiction to decide the limitation defense and to require an increase in the amount of the fund deposited with the Court. Accordingly, the petition is dismissed, the funds deposited with this Court are released and claimants may proceed with their state court action against Bayview.

692 F. Supp. at 1481. Applying Cincinnati Gas & Electric Co. and Vatican Shrimp Co., and noting that jurisdiction over limitation of liability was exclusively within the federal courts, the court concluded that there was no basis to exercise federal jurisdiction since the defendant had not filed his petition for limitation of liability timely:

> Bayview has correctly noted that exclusive jurisdiction of the federal court to decide issues of limitation, [citations omitted] as well as the necessity of filing certain stipulations prior to proceeding with any state court action. [citations omitted] Bayview's position is flawed, however, because it is not pointed to a basis for the exercise of the federal court's admiralty jurisdiction in this case.

> Had claimants brought their personal injury claims in a federal court, that court would have had subject matter jurisdiction to decide issues concerning the availability of the limitation defense prior to considering the case on the merits... Similarly, a timely filed limitation petition would have given this court jurisdiction to either decide the limitation issues or to consider appropriate stipulations protecting the jurisdiction of the admiralty court to decide those issues. [citations omitted] Problems arise, however, where, as here, claimants chose to bring their personal injury case in a state court and the vessel owner's limitation petition is dismissed as untimely. In such a case, it appears to the Court that the owner lacks the procedural vehicle for bringing the limitation issues before the federal forum.
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> . . . .
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> . . . [T]his Court can find no basis, other than a timely filed Section 185 petition, for exercising its jurisdiction to determine issues of liability. . . . Under these procedural circumstances, Bayview's failure to file its Section 185 petition in a timely manner has resulted in its inability to claim the limitation defense.

692 F. Supp. at 1486-87.

The clear weight of federal authority required that the Tennessee Supreme Court affirm the state trial court's order striking MBL's affirmative defense. However, the Tennessee Supreme Court chose to ignore this controlling federal precedent, and hold instead that MBL could adjudicate its defense in

state court. This Court should issue a writ of certiorari to correct the clear error of the Tennessee court.

III. The Tennessee Supreme Court was required to follow Vatican Shrimp and Cincinnati Gas as the controlling federal maritime law.

Cincinnati Gas and Vatican Shrimp hold that the vessel owner must timely file a complaint for limitation of liability in federal court, otherwise the defense is forfeited should the claimant file suit in state court, because the state court lacks jurisdiction to adjudicate a defense asserted under 46 U.S.C. §183. This is the applicable and controlling law which the Tennessee Supreme Court was constitutionally required to follow, and that court's failure to do so constitutes reversible error.

Although the "savings to suitors" clause in 28 U.S.C. §1333 afforded MAPCO the right to bring suit in state court, the substantive law applicable in the state court was still "federal maritime law," i.e., the law developed by the federal courts in the exercise of their admiralty jurisdiction and the law enacted by Congress.[8] Federal law, and not state law, controlled the disposition of all issues presented in the Tennessee court.

Under Article III of the U.S. Constitution and under 28 U.S.C. §1333, the U.S. Supreme Court and the other federal courts, and not the state courts, are responsible for fashioning the

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[8] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314, 75 S.Ct. 368, 370 (1955); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10, 74 S.Ct. 202, 205 (1953); Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-45, 63 S.Ct. 246, 250-51 (1942); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 503 (1918); Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 529 (1917). See Roth v. Cox, 210 F.2d 76, 80 (5th Cir. 1954), aff'd, 348 U.S. 207, 210, 75 S.Ct. 242, 244 (1953).

parameters and substance of maritime law.[9] State courts are constitutionally obligated to follow the federal maritime law as created by federal court decisions and as created by federal statute.[10] Furthermore, where a federal statute is involved, the state court is required to follow federal court decisions interpreting that statute, and the state court is not free to substitute its own judgment for that of the federal courts, particularly where the federal courts are exercising their exclusive admiralty jurisdiction.[11] Therefore, the Tennessee court was not free to adopt its own interpretation of the Limitation of Liability Act, but instead was required to follow federal court decisions interpreting the

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[9] Garrett v. Moore-McMormack Co., 317 U.S. 239, 243-45, 63 S.Ct. 246, 250-51 (1941); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 503 (1918). By virtue of Article III of the U.S. Constitution and by virtue of 28 U.S.C. §1333, the federal courts (not the state courts) are empowered to develop the substantive maritime law applicable to all cases falling within the admiralty and maritime jurisdiction, subject of course to occasional legislation into that area by Congress. Romero v. International Terminal Operating Co., 358 U.S. 354, 360-67, 79 S.Ct. 468, 474-77 (1959). See United States v. Reliable Transfer Co., 421 U.S. 397, 409, 95 S.Ct. 1708, 1715 (1975); Fitzgerald v. United States Lines Co., 374 U.S. 16, 20, 83 S.Ct. 1646, 1650 (1963); Crowell v. Benson, 285 U.S. 22, 53, 52 S.Ct. 285, 293 (1932).

[10] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314, 75 S.Ct. 368, 370 (1955); Garrett v. Moore-McMormack, 317 U.S. 239, 244-45, 63 S.Ct. 246, 250-51 (1942); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 503 (1918); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10, 74 S.Ct. 202, 205 (1953). See Roth v. Cox, 210 F.2d 76, 79-80 (5th Cir. 1954), aff'd, 348 U.S. 207, 210, 75 S.Ct. 242, 244 (1953).

[11] Id.

statute.[12]

In this instance, federal maritime law (as determined by innumerable federal court decisions) held (1) that only the federal courts had jurisdiction to adjudicate any issue relating to the vessel owner's defense of limited liability under 46 U.S.C. §183, and (2) that the vessel owner could not raise the defense in a state court proceeding (over the objection of a claimant) where the vessel owner had not previously timely filed a complaint for limitation of liability in federal court. Therefore, the controlling federal maritime law in this instance required that respondent's affirmative defense of limitation of liability be stricken for lack of jurisdiction. The Tennessee Supreme Court was constitutionally obligated to follow this federal court precedent, and therefore, was constitutionally required to affirm the judgment of the trial court.

IV. The Tennessee Supreme Court's error is due to its misunderstanding of the Act and its misunderstanding of federal decisions interpreting the Act.

The Tennessee Supreme Court completely misunderstood the substantive and procedural provisions of the Limitation of Liability Act, hence its error in refusing to apply Cincinnati Gas and Vatican Shrimp. The Tennessee Supreme Court stated:

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[12] The Supreme Court's determination of a federal question is binding on the state courts, and any state court decision contrary to that of the Supreme Court is invalid; state courts cannot ignore a decision of the U.S. Supreme Court concerning a question of federal law. Chesapeake & Ohio Rwy. Co. v. Martin, 283 U.S. 209, 221, 51 S.Ct. 453, 458 (1931). See U.S. Constitution, Article VI, Cl.2.

> Although the Act specifically provides a procedure for limiting liability through the filing of a Section 185 petition in federal court, the U.S. Supreme Court has long recognized that this is not the exclusive means by which a vessel owner may assert the limitation defense under Section 183. The benefits of Section 183 can also be obtained by raising the limitation by way of answer to a suit commenced in state court against the vessel or its owner. Ex Parte Green, 286 U.S. 436, 52 S.Ct. 602, 76 L.Ed. 1212 (1932); Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931); Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 1927 (1922); The SCOTLAND, 105 U.S. 24, 26 L.Ed. 1001 (1881). Thus, the rule is that the vessel owner may raise the Section 183 limitation defense in its answer in state court brought by the injured party under the savings to suitors clause of Section 1333, as well as in a concursus proceeding brought in federal court by the vessel owner under Section 185. Langnes, 51 S.Ct. at 246-47; Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164, 1173 (5th Cir. 1981); The CHICKIE, 141 F.2d 80, 84 (3d Cir. 1944).

Opinion of Supreme Court of Tennessee, pp. 6-7.

The Tennessee Court's statement is wrong as it relates to asserting the defense in a state court proceeding. The cases cited by the Tennessee Supreme Court do not hold that limitation of liability may be asserted by way of answer to a suit commenced in state court; all of the cases cited by the Tennessee Supreme Court involved federal court proceedings. Although the U.S.

Supreme Court (not Congress) has recognized that limitation of liability may be pled as an affirmative defense (such that the procedure under §185 is not the sole means for asserting the defense), the defense may be so asserted only in respect to a federal court proceeding. If the claimant chooses to file suit in state court, the vessel owner cannot plead limitation of liability in his state court answer over the claimant's objection. Neither the Supreme Court nor any other federal court has ever held otherwise.

The Tennessee Supreme Court was hung up on this Court's language in Langnes v. Green that "This Court has accepted the view that in a state court, when there is only one possible claimant and one owner, the advantage of limitation may be obtained by proper pleading."[13] However, as this Court explained later in Ex Parte Green, this statement did not mean that the state courts have concurrent jurisdiction, for if the defense were challenged in state court, the state court was powerless to adjudicate the defense.[14] This Court's statement in Langnes v. Green simply acknowledged the maritime practice allowed at that time whereby the vessel owner could reserve its right in the state court proceeding to raise limitation at a later date in federal court. However, the 1936 Amendment to the Act stopped this practice, by requiring in §185 that the complaint be filed within six months of written notice of a claim.[15] As this Court explained in Ex Parte Green, nothing in Langnes v. Green was meant to authorize the exercise of state court jurisdiction.

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[13] 282 U.S. at 540, 51 S.Ct. at 247.

[14] Ex Parte Green, 286 U.S. at 439-40, 52 S.Ct. at 603.

[15] See In re Okeanos Ocean Research Foundation, Inc., 704 F.Supp. 412, 413-14 (S.D.N.Y. 1989).

The Tennessee Supreme Court also misconstrued the holdings in Langnes v. Green and Ex Parte Green, and thereby erroneously distinguished those cases from the procedural posture of the instant case. The following statement of the Tennessee Supreme Court clearly demonstrates its error:

> Significantly, the court in Langnes and Ex Parte Green did not hold that where, as in the instant case, the vessel owner elects to proceed with its limitation defense in the state court action instead of filing a Section 185 petition in federal court the state court does not have subject matter jurisdiction. Read together, Langnes and Ex Parte Green hold only that when the injured party sues in state court and the vessel owner responds by filing a Section 185 petition in federal court, the federal court has jurisdiction. The difference between Langnes and Ex Parte Green in the instant case is that Memphis Barge did not file a Section 185 petition in federal court—unlike the vessel owner in Langnes and Ex Parte Green. As discussed below, this difference is dispositive.
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> . . . .
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> Based upon the foregoing discussion, we hold that a state court is empowered to decide the applicability and merits of a Section 183 limitation defense when it is raised by way of answer and there is no companion Section 185 proceeding in federal court. This necessarily means that a state court would not have jurisdiction when the vessel owner elects to assert its Section 183 limitation defense in a timely filed Section 185 petition. Memphis

> Barge has not filed a Section 185 petition and thus its Section 183 right of limitation has not been made subject to exclusive federal subject matter jurisdiction. . . . We thus construe Langnes and Ex Parte Green to recognize that a state court is fully competent to hear and decide the merits of a limitation defense, provided the vessel owner does not invoke the exclusive jurisdiction of the federal courts by filing a Section 185 concursus petition. . . .

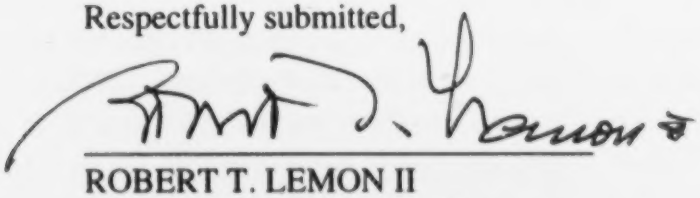
Opinion of Supreme Court of Tennessee at pp. 10-11 & 13-14.

The Tennessee Supreme Court is simply wrong in its premise that state court concurrent jurisdiction exists to adjudicate the vessel owner's defense of limited liability because the vessel owner had not chosen to file a complaint for limitation of liability in federal court. Simply because a vessel owner has chosen not to file a complaint in federal court does not give rise to concurrent jurisdiction in the state court. Rather the jurisdiction to adjudicate the defense of limited liability under 46 U.S.C. §183, whether raised by complaint or by answer, is wholly within the exclusive jurisdiction of the federal courts, so if the vessel owner chooses not to file a complaint for limitation of liability in federal court, the vessel owner forfeits the defense should the claimant file its lawsuit in a state court. Whether or not the vessel owner chooses to file a complaint for limited liability in federal court is irrelevant to the state court's exercise of jurisdiction, because the state courts do not have jurisdiction to adjudicate the defense in the first place. Thus, there is absolutely no authority for the Tennessee Supreme Court's premise that state courts have jurisdiction to adjudicate the vessel owner's defense of limited liability under 46 U.S.C. §183 unless and until the vessel owner chooses to file a complaint for limited liability in federal court.

CONCLUSION

The Tennessee Supreme Court's decision is without support, and is completely contrary to entrenched federal precedent on the subject. The federal courts have exclusive jurisdiction to adjudicate all issues relating to the vessel owner's defense of limited liability under 46 U.S.C. §183. Federal law requires the vessel owner to file a complaint for limitation of liability in federal court within six months of receiving written notice of a claim, otherwise the defense is forfeited should the claimant file suit in a state court, because state courts lack jurisdiction to adjudicate the defense if challenged by the claimant. The Tennessee Supreme Court's refusal to respect federal exclusive jurisdiction, and its refusal to follow federal maritime law, constitutes reversible error. Accordingly, petitioner MAPCO PETROLEUM Inc. respectfully prays that a writ certiorari be granted to reverse the judgment and decision of the Supreme Court of Tennessee.

Respectfully submitted,



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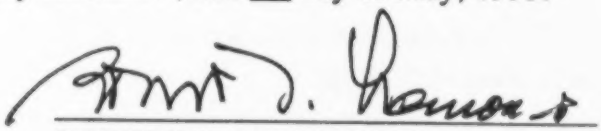
CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari have been forwarded to all counsel of record by depositing same in the U.S. mail, postage prepaid and properly addressed, this 14th day of May, 1993.



ROBERT T. LEMON II

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MAPCO PETROLEUM, INC.,
Plaintiff-Appellant,

V.

MEMPHIS BARGE LINE, INC.,
Defendant-Appellant.

SHELBY LAW NO.
02501-9203-CV-00025
(No. 21556 T. D. Below)

OPINION

JUDGMENT OF COURT OF APPEALS MODIFIED,
JUDGMENT OF TRIAL COURT REVERSED.

DROWOTA, J.

In this admiralty case, Mapco Petroleum, Inc. ("Mapco"), and Memphis Barge Line, Inc. ("Memphis Barge") have appealed from a judgment of the Court of Appeals finding that the Circuit Court for Shelby County lacked jurisdiction to consider a limitation of liability defense asserted pursuant to 46 U.S.C. § 183. The issue presented is one of first impression, whether courts of this state have subject matter jurisdiction to adjudicate an affirmative defense asserted under the Limitation of Vessel Owner's Liability Act, specifically 46 U.S.C. § 183. We answer in the affirmative and, accordingly, reverse the courts below.

The Defendant, Memphis Barge, is the owner and operator of the vessel M/V Sebring. The Plaintiff, Mapco, is the owner and operator of petroleum refinery and dock facilities located on the Mississippi River. On December 7, 1986, the M/V Sebring was pushing a 3-barge tow towards one of Mapco's dock

facilities for the purpose of mooring at the dock for the night. Instead of mooring as intended, a barge being towed by the M/V Sebring struck and damaged Mapco's dock.

Mapco filed suit against Memphis Barge in the Circuit Court of Shelby Country claiming that the damage to its dock was attributable to the negligence of Memphis Barge. In its answer, Memphis Barge asserted an affirmative defense under 46 U.S.C. § 183, seeking to limit its liability to $353,515.58, the value of the M/V Sebring and its freight. Mapco moved to strike the affirmative defense, claiming that the court lacked subject matter jurisdiction to consider it. The trial court agreed and ordered the defense stricken. Thereafter, the parties stipulated that Mapco was entitled to recover damages in the amount of $690,000.00 exclusive of pre-judgment interest. The trial court entered judgment in accordance with this stipulation, plus interest, for a total judgment of $905,915.02. Memphis Barge then appealed. The Court of Appeals held that "state courts lack jurisdiction to determine if a vessel owner is entitled to limited liability if the shipowner's right to limit liability is challenged." However, the Court remanded the case for a determination of whether Mapco had a non-frivolous basis for challenging the defense on the merits. Both parties have appealed from the decision of the Court of Appeals.

I.

Our analysis of the jurisdictional question in this case must begin with the recognition that Article III, Section 2, of the United States Constitution vests admiralty and maritime jurisdiction in the federal courts. Congress implemented this constitutional power in 28 U.S.C. § 1333 which provides in part that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (l) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other

remedies to which they are otherwise entitled." The so-called "savings to suitors clause" of Section 1333 gives a party injured in an incident occurring on the navigable waters of the United States the option of filing a claim in a state court instead of a federal court whenever the injured party is seeking a common law remedy (i.e., money damages as in the instant case). Roth v. Cox, 210 F.2d 76, 78-79 (5th Cir. 1954), aff'd, 348 U.S. 207 (1955); Eastern Steel & Metal Co. v. Hartford Fire Ins. Co., 376 F. Supp. 763, 765 (D. Conn. 1974); Pfeiffer v. Weiland, 226 N.W.2d 218, 220 (Iowa 1975); Herbert v. Diamond M. Co., 367 So.2d 1210, 1215 (La. App. 1978). Relying on the savings to suitors clause of Section 1333, Mapco Plaintiff herein, elected to file its lawsuit seeking money damages in the Circuit Court of Shelby County.

As stated above, Memphis Barge asserted in its answer an affirmative defense under 46 U.S.C. § 183, which provides in pertinent part:

> (a) The liability of the owner of any vessel, whether American or foreign, for any . . . loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183(a).

Section 183 is the substantive provision of the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181 et seq.[1] It provides that the owner of a vessel can limit liability for losses occurring on the navigable waters of the United States to the value of the vessel and its freight, provided the loss occurred without the privity and knowledge of the owner or owners.[2]

Aside from Section 183, Section 185 of the Act provides for a procedure known as a "concursus," whereby the vessel owner can file a petition in federal court evoking the limitation of liability provision of Section 183.[3] The purpose behind a Section 185 proceeding in federal court is to permit all actions

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[1] Congress enacted the Act in 1851 in an effort to promote American merchant marine trade and to put American vessel owners on equal footing with their foreign competitors. See Norwich Company v. Wright, 80 U.S. 104 (1871).

[2] Knowledge and privity of the owner or owners as used in Section 183 means that the owner or owners were aware or should have been aware of the likelihood of the incident prior to the ship's departure. Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 952 (3rd Cir. 1985). In other words, there can be no limitation of liability when the owner knew or should have known the vessel was unseaworthy or had a defect or condition likely to cause loss. Shaver Transportation Co. v. Chamberlain, 399 F.2d 893, 895 (9th Cir. 1968); Zeringue v. Golf Fleet Marine Corp., 666 F.Supp. 860, 863 (E.D. La. 1986); Petition of Oskar Tiedemann & Co., 179 F.Supp. 227, 236 (D. Del. 1959), aff'd, 289 F.2d 237 (3rd Cir. 1961).

[3] "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability .... Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U.S.C. § 185.

against the vessel owner to be consolidated in a single case which will then dispose of all claims simultaneously. Complaint of Caldas, 350 F.Supp. 566, 575 (E. D. Pa. 1972), aff'd, 485 F.2d 678, 679 (3rd Cir. 1973). Congress established the Section 185 concursus procedure because maritime casualties often involve interstate commerce with injuries to multiple parties with diverse domiciles. As a result, a ship owner can be subject to multiple suits by multiple parties in multiple forums. For whatever reason, perhaps because of the lack of the threat of multiple suits, Memphis Barge did not file a Section 185 limitation of liability proceeding in federal court.

Although the Act specifically provides a procedure for limiting liability through the filing of a Section 185 petition in federal court, the U. S. Supreme Court has long recognized that this is not the exclusive means by which a vessel owner may assert the limitation defense under Section 183. The benefits of Section 183 can also be obtained by raising the limitation by way of answer to a suit commenced in state court against the vessel or its owner. Ex Parte Green, 286 U. S. 437, 52 S. Ct. 602, 76 L.Ed. 1212 (1932); Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931); Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 66 L.Ed. 927 (1922); The Scotland, 105 U.S. 24, 26 L.Ed. 1001 (1881). Thus, the rule is that the vessel owner may raise the Section 183 limitation defense in its answer in state court brought by the injured party under the savings to suitors clause of Section 1333, as well as in a concursus proceeding brought in federal court by the vessel owner under Section 185. Langnes, 51 S. Ct. at 246-47; Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164, 1173 (5th Cir. 1981)[4]; The Chickie, 141 F.2d

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[4] "The statute offers two avenues of limitation. A vessel owner may petition the district court, pursuant to 46 U.S.C. Section 185, the limitation of liability within six months of written notification to it of a possible claim; under Section 185, the owner's petition in a particular

[4] Continued on next page

80, 84 (3rd Cir. 1944). Accordingly, state courts have adjudicated the right of vessel owners to limit their liability under Section 183. See, e.g., Fishboats, Inc. v. Welzbacher, 413 So. 2d 710, 717-19 (Miss. 1982); The Golden Touch, 1967 A.M.C. 353 (R. I. Super. Ct. 1966), cert. denied, 226 A.2d 505 (R.I. 1967); De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218 (N.Y.Sup. 1943); Loughin v. McCaulley, 40 A. 1020, 1021-22 (Pa. 1898).

II.

Relying upon Vatican Shrimp Co., Inc. v. Solis, 820 F.2d 674 (5th Cir. 1987), and Cincinnati Gas & Elec. Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976), Plaintiff Mapco contends that the Section 183 limitation defense can be asserted as an affirmative defense in a state court action, but the state court loses subject matter jurisdiction to consider the defense if the plaintiff contests the vessel owner's right to limit liability. Memphis Barge argues that Vatican Shrimp and Cincinnati Gas are inapplicable and, in any event, misconstrue the U. S. Supreme Court decisions in Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243, 75 L. Ed. 520 (1931), and Ex Parte Green, 286 U.S. 437, 52 S. Ct. 602, 76 L. Ed. 1212 (1932). Memphis Barge maintains that a state court does have subject matter jurisdiction to adjudicate a Section 183 defense when there is no companion Section 185 action pending in federal court to divest the state court of jurisdiction.

A. Langnes and Ex Parte Green

In Langnes, the injured party elected to commence suit seeking damages in state court instead of federal court under the

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[4] Continued

case may well be the first filing in court. Section 183, which established the substantive right of a vessel owner to limitation, also allows limitation to be pled as a defense in answer to an earlier filed damage suit." 654 F.2d at 1173.

savings to suitors clause of Section 1333. Two days before the trial, the vessel owner commenced its own Section 185 petition in federal court which, in turn, issued an order restraining further prosecution of the state court action. Langnes, 51 S.Ct. at 244.

The U. S. Supreme Court first observed that under the savings to suitors clause, the injured party had a right to proceed in state court because he was seeking a common law remedy, money damages. Id. at 246. At the same time though, Section 185 gave the vessel owner the right to seek limitation of liability in federal court. Id.[5] Given these competing legal interests, the Court cast the case in the following terms:

> Upon the face of the record, the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner. The difference in the effect of adopting one or the other of the two alternatives presented to the district court was obvious. To entertain the cause [in federal court] would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the case to the state court would be to preserve the rights of both parties.

Id. at 247. Recognizing that the need for a concursus was nonexistent in the context of a single claimant dispute, the Court

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5 "That the action brought in the state court was authorized by [the savings to suitors clause] is plain. That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, . . . is equally clear. (citations omitted). The situation, then, is that one statute gave [the injured party] the right to a common law remedy, which he properly sought in the state court; and another statute [Section 185] gave [the vessel owner] the right to seek a limitation of liability in the federal district court." 51 S. Ct. at 246.

dissolved the restraining order "retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but . . . unlikely event that the right of the [ship owner] to a limited liability might be brought into question . . . or the case otherwise assume such form as to bring it within the exclusive power of [the federal court]." Id.

In analyzing the case, the Supreme Court observed that had the vessel owner elected to do so, he could have pleaded the Section 183 limitation defense in the state court action and obtained a complete resolution of that defense there:

> [T]his Court has accepted the view that in a state court, when there is only one possible claimant and one owner, the advantage of [Section 183] may be obtained by proper pleading. (Citations omitted).
>
> Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common law powers, was competent to entertain the claim of a ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. (Citations omitted).

Id. at 247. The Court added that the ship owner was not required to raise the Section 183 limitation defense in the state court action, but could opt for the other procedural means of doing so by filing a Section 185 petition in federal court and then pleading Section 183 there. Id.

Shortly after the Langnes decision, the Court was called upon in Ex Parte Green to write a short follow-up to Langnes

because the injured party challenged, in the state court, the vessel owner's knowledge and privity. Ex Parte Green, 52 S.Ct. at 603. The Court, in Ex Parte Green, reiterated most of what it said in Langnes and held that the case was properly before the federal court for resolution. Id.

Significantly, the Court in Langnes and Ex Parte Green did not hold that where, as in the instant case, the vessel owner elects to proceed with its limitation defense as an affirmative defense in the state court action instead of filing a Section 185 petition in federal court, the state court does not have subject matter jurisdiction. Read together, Langnes and Ex Parte Green hold only that when the injured party sues in state court and the vessel owner responds by filing a Section 185 petition in federal court, the federal court has jurisdiction. The difference between Langnes and Ex Parte Green and the instant case is that Memphis Barge did not file a Section 185 petition in federal court — unlike the vessel owner in Langnes and Ex Parte Green. As discussed below, this difference is dispositive.

B. Vatican Shrimp and Cincinnati Gas

Vatican Shrimp and Cincinnati Gas, both cited by Mapco as authority that the trial court lacked jurisdiction to adjudicate the Section 183 limitation defense, involved essentially the same facts. In both cases, the injured party filed suit in state court and the vessel owner plead the limitation defense under Section 183. Thereafter, the vessel owners commenced Section 185 proceedings in federal court, but did so after the 6 month time period contained in Section 185 had expired. Thus, the narrow issue presented to the Fifth and Sixth Circuits in Vatican Shrimp and Cincinnati Gas was whether a vessel owner, by asserting the Section 183 limitation defense as an affirmative defense in state

court, tolled the time bar applicable to Section 185 for purposes of commencing limitation proceedings in federal court. In both cases, the court concluded that the Section 185 proceedings were not timely filed and dismissed the limitation petitions.

In support of its position in the instant case, Mapco points to various statements in Vatican Shrimp and Cincinnati Gas to the effect that "[w]hen the right to limited liability is contested it becomes impossible to dispose of all issues in a single proceeding in a state court." Cincinnati Gas, 533 F.2d at 1004. Also, "[t]he state court lost jurisdiction of the limitation liability issue when the claimant contested the owner's right to avail itself of limitation and only an admiralty court had jurisdiction to decide the issue." Id. at 1005.

These statements in Vatican Shrimp and Cincinnati Gas were made in the context of a vessel owner ultimately electing to proceed by way of Section 185 in federal court and have the limitation defense of Section 183 heard in that proceeding. Vatican Shrimp and Cincinnati Gas are unlike the present case where the vessel owner, Memphis Barge, elected to plead its Section 183 defense in the state court proceeding instead of a Section 185 petition in federal court. In other words, neither Vatican Shrimp or Cincinnati Gas addressed the precise issue before this Court which is whether a state court has jurisdiction to hear a Section 183 limitation defense when the vessel owner, instead of filing a Section 185 petition in federal court, elects to have the defense heard in state court by affirmatively pleading it. Rather, Vatican Shrimp and Cincinnati Gas both address the question of whether a Section 185 petition, which by its express terms must be filed in federal court within 6 months, was filed timely, even though the vessel owner plead the Section 183 limitation defense in state court within the 6 months.

Moreover, Langnes and Ex Parte Green, relied upon by

Vatican Shrimp and Cincinnati Gas, must be viewed in a procedural posture distinct from the present case. In Ex Parte Green, the follow-up to Langnes, the vessel owner, unlike Memphis Barge, had filed a Section 185 concursus proceeding in federal court—an action which, by the express terms of Section 185, specifically conferred exclusive jurisdiction on the federal court thereby removing the issue from the state court's jurisdiction. The vessel owner had invoked Section 185's statutory divestiture of concurrent subject matter jurisdiction. Memphis Barge has not.

III.

Based upon the foregoing discussion, we hold that a state court is empowered to decide the applicability and merits of a Section 183 limitation defense when it is raised by way of answer and there is no companion Section 185 proceeding in federal court. This necessarily means that a state court would not have jurisdiction when the vessel owner elects to assert its Section 183 limitation defense in a timely filed Section 185 petition. Memphis Barge has not filed a Section 185 petition and thus its Section 183 right of limitation has not been made subject to exclusive federal subject matter jurisdiction. This holding is consistent with the U. S. Supreme Court's observation in Langnes that "the advantage of [Section 183] may be obtained by proper pleading" when there is one claimant and one owner and that the "state court, in the action there pending and in the due course of the exercise of its common law powers, was competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject." 51 S. Ct. at 247 (emphasis supplied). We thus construe Langnes and Ex Parte Green to recognize that a state court is fully competent to hear and decide the merits of a limitation defense, provided the vessel owner does not invoke the exclusive jurisdic-

tion of the federal courts by filing a Section 185 concursus petition. Other courts, either explicitly or by implication, have reached the same conclusion. See Fishboats, Inc. v. Welzbacher, 413 So.2d 710 (miss 1982) (affirming trial court's finding that owner had privity and knowledge of unseaworthy condition of vessel and thus was not entitled to limit liability); The Golden Touch, 1967 A.M.C. 353 (R.I. Super. Ct. 1966), cert. denied, 226 A.2d 505 (R.I. 1967) (motion to strike limitation of liability defense denied where raises by way of answer if federal jurisdiction was not invoked.); De Pinto v. O'Donnell Transp. Co., 40 N.Y.S.2d 218 (N.Y. Sup. 1943) (holding that the vessel owner was not entitled to limit liability because it had "privity or knowledge"); Brinson & Kramer v. Norfolk S. R. Co., 86 S.E. 371, 373 (N.C. 1915) (trial court's judgment for vessel owner, relying on Section 183, reversed where owner failed to establish vessel's seaworthiness); Loughin v. McCaulley, 40 A. 1020 (Pa. 1898)("[w]e are of the opinion that [the defendant owner's] right to make this defense [Section 183] is clear and we see no difficulty in our enforcing it in this action).

Finally, we note that Section 183, in creating the limitation defense, itself places no restriction upon the forum in which the defense may be asserted. Section 185, in contrast, specifically restricts the forum in which a concursus may be brought to federal court. Had Congress intended to similarly limit Section 183, it could have included the same restriction. The implication is that Congress did not intend to deny the limitation defense to a vessel owner who, because of the absence of the threat of widespread litigation with multiple plaintiffs, elects not to proceed by way of concursus in federal court.

The judgment of the Court of Appeals is modified. The case is remanded for proceedings consistent with this opinion. Upon remand, Mapco can, of course, challenge the limitation defense on its merits, i.e., the value of the vessel and its freight, and or its applicability, i.e., knowledge and privity of the owner.

Costs are taxed to Mapco.

(Signed) FRANK F. DROWOTA, III
JUSTICE

Concur:

Reid, C. J.
O'Brien, Daughtrey and Anderson, JJ.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MAPCO PETROLEUM, INC., Plaintiff-Appellant/Appellee,	SHELBY LAW NO. 02S01-9203-CV-00025 (No. 21556 T. D. Below)
VS.	
MEMPHIS BARGE LINE, INC. Defendant-Appellee/Appellant.	Judgment of Court of Appeals Modified, Judgment of Trial Court Reversed

JUDGMENT

This cause came on to be heard upon the record from the Court of Appeals, Western Section at Jackson, applications for permission to appeal having been heretofore granted, briefs and arguments of counsel; upon consideration whereof, this Court is of opinion that the judgment of the Court of Appeals should be modified and the judgment of the trial court should be reversed for the reasons set out in the opinion filed (a copy of which is attached hereto).

In accordance with the opinion of the court filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the Court of Appeals is modified and the judgment of the trial court is reversed. The cause is remanded to the Circuit Court of Shelby County for further proceedings not inconsistent with this Court's opinion, a certified copy of which will accompany the mandate on the remand, and for the collection of the costs accrued below; for all of which let the mandate issue.

Costs are taxed to the plaintiff, Mapco Petroleum, Inc., for which execution may issue, if necessary.

2/22/93.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

MAPCO PETROLEUM, INC.,
Plaintiff/Appellee,

vs.

SHELBY LAW NO.
02A01-9103-CV-00044

MEMPHIS BARGE LINE, INC.,
Defendant/Appellant.

From the Circuit Court of Shelby County, Tennessee
The Honorable Wyeth Chandler, Judge

Opinion Filed: Oct. 29, 1991

AFFIRMED AS MODIFIED AND REMANDED

HIGHERS, J.

TOMLIN, P. J., W. S. (Concurs)
FARMER, J. (Concurs)

This suit was brought in the Shelby County Circuit Court by plaintiff MAPCO Petroleum, Inc. to recover damages arising when a barge being towed by the M/V Sebring struck a dock owned and operated by plaintiff. In its answer the defendant, Memphis Barge Line, the owner and operator of the M/V Sebring, raised a defense under 46 U.S.C. Section 183, the Limitation of Liability Act. The questions presented by this appeal are whether the state court lacks jurisdiction to adjudicate defendant's affirmative defense under the Limitation of Liability Act. and whether the trial court abused its discretion in its award of prejudgment interest.

The facts are undisputed. On December 7, 1986, at approximately 8:00 p.m., the M/V Sebring owned by Memphis Barge Line was pushing a three-barge tow towards MAPCO Petroleum's North dock facility located on the Mississippi River. Instead of mooring at the North dock as intended, the M/V Sebring struck and damaged the dock rendering it unusable.

Prior to the accident MAPCO maintained two docks, the North dock and the South dock both of which serviced an adjacent oil refinery. MAPCO also owns a third dock known as the Gulf dock which was not in use prior to the accident. After the accident MAPCO rerouted its pipeline from the damaged North dock to the previously unused Gulf dock. MAPCO has not repaired the North dock since the accident.

On December 8, 1986, MAPCO Petroleum notified Memphis Barge Line by letter of its claims against Memphis Barge Line arising out of the incident. On September 1, 1987, MAPCO filed a complaint against Memphis Barge Line in the Shelby County Circuit Court claiming that the damage caused to its dock was attributable to Memphis Barge Line's negligence and seeking to recover damages arising out of the accident. In its answer defendant asserted an affirmative defense under 46 U.S.C. § 183, the Limitation of Liability Act, seeking to limit its liability in the lawsuit to $353,515.58, the value of the M/V Sebring and its pending freight. In response, the plaintiff moved to strike defendant's affirmative defense under the Limitation of Liability act claiming that pursuant to federal law the state court lacked jurisdiction to hear the limitation of liability defense. The trial court granted the plaintiff's motion holding that it was without jurisdiction to decide the defendant's limitation of liability defense.

Following the court's decision regarding the limitation of liability defense, the parties stipulated that the negligence of

the defendant was the proximate cause of the damages to plaintiff's dock and that plaintiff incurred $690,000 damages, exclusive of prejudgment interest. The only question submitted to the trial court for decision was the amount of prejudgment interest to which plaintiff was entitled. On July 26, 1990, the trial court heard arguments on the question of the amount of prejudgment interest, and on December 14, 1990, entered a judgment awarding plaintiff interest from the date of the accident to the date of judgment at a rate of ten percent per annum on $166,537.57, representing the sum expended by MAPCO in the repairs on the dock facility. The trial court also awarded the plaintiff prejudgment interest for the same period in the amount of six percent per annum on $523,562.63, representing the damages awarded MAPCO for the cost of repairs that had not been made. Plaintiff appeals the trial court's judgment claiming that: (1) The trial court erred by ruling that it lacked jurisdiction to decide the defendant's affirmative defense under the Limitation of Liability Act; and (2) the trial court abused its discretion in awarding any prejudgment interest on the amount of damages attributable to repairs not actually made.

I.

The question of whether the state courts have jurisdiction to decide a properly pled affirmative defense under the Limitation of Liability Act is a question of first impression for the courts of this state. This issue has, however, been addressed in numerous federal court decisions.

Article III, § 2 of the United States Constitution vests admiralty and maritime jurisdiction in the federal courts. Congress has implemented this grant of power in 28 U.S.C. Section 1333. Section 1333, however, also contains the Savings-to-Suitors Clause which permits a party injured in an incident occurring on the navigable waters of the United States the option

of asserting a claim in a state court instead of a federal court. Roth v. Cox, 210 F.2d 76 (5th Cir. 1954) aff'd 348 U.S. 207 (1921). Concurrent state court jurisdiction under the Savings-to-Suitors Clause extends whenever a litigant is seeking a common law remedy, including actions for damages.

Congress enacted the Limitation of Liability Act, 46 U.S. Section 181 et. seq. in 1851 in an effort to promote American merchant marine trade and to put American vessel owners on equal footing with their foreign competitors. See Norwich Company v. Wright, 80 U.S. 104 (1871). The Act contains two provisions relevant to the disposition of this case. Section 183 is the substantive provision of the Act. It provides that the owner of any vessel may limit his liability for losses occurring on the navigable waters of the United States to the value of the vessel and its pending freight, as long as the loss occurred without the privity and knowledge of the owner. Section 185 of the Act provides a procedure known as a concursus, whereby a vessel owner can file a petition in federal court for a limitation of liability. The owner pays into the court an amount equal to the value of the vessel and its freight and all other proceedings against the owner with respect to the matter at issue are stayed and must be brought in the concursus proceeding. In a Section 185 proceeding, the federal court determines whether the vessel owner is liable in the first place, whether the owner has the right to a limited liability because of a lack of privity and knowledge,[1]

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[1] In a situation like the present where the shipowner seeking to limit its liability is a corporation "privity and knowledge scrutiny focuses on whether the shore-based high-level management was aware or should have been aware of the likelihood of the occurrence before the ship's departure." Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943 (3rd Cir. 1985).

the value of the vessel and its freight, the amount of damages sustained by its claimant, and if the amount of damages exceeds the fund, the pro rata distribution of the limitation fund among the plaintiffs. In 1936 Congress amended Section 185 to include a six month period of limitations for filing a concursus petition in federal court which accrues when the claimant gives the owner written notice of the claim.

Although the Act specifically provides a procedure for limiting liability through the filing of a Section 185 petition in federal court, the United States Supreme Court has long held that this is not the exclusive means by which a shipowner can limit its liability. The Act's benefits can also be obtained by asserting limitation as a defense to a suit commenced against the vessel or owner by an injured claimant. The Scotland, 105 U.S. 24 (1882); Carlisle Packing Co. v. Sandanger, 259 U.S. 253 (1922); Langnes v. Green, 282 U.S. 531 (1931); Ex parte Green, 286 U.S. 487 (1932); See also 7A Moore's Federal Practice, ¶F.03. The Supreme Court has specifically held that the vessel owner can assert this defense by answer to a suit brought in a state court under the Savings-to-Suitors clause as well as one brought in a federal court. Langnes v. Green, supra. Lower federal courts have further held that the Section 185 six-month statute of limitations for filing a concursus petition does not apply when the limitation of liability is asserted as a defense by answer. Deep Sea Tankers Lmtd. v. The Long Branch, 258 F.2d 757 (2nd Cir. 1958), cert. denied 358 U.S. 933 (1959); The Chickie, 141 F.2d 80 (3rd Cr. 1944). Under the authority of these federal decisions interpreting the Limitation of Liability Act, numerous state courts have adjudicated the right of vessel owners to limit their liability under the Act. See Fishboats, Inc. v. Welzbacher, 413 So.2d 710 (Miss. 1982); The Golden Touch, 1967 AMC 353 (R.I. Super. Ct. 1966); DePinto v. O'Donnell, Transp. Co. 40 N.Y.S.2d 218 (N.Y.S. Ct. 1943); Loughin v. McCaulley, 40 A. 1020 (Pa. 1989).

From the foregoing it would appear as though the defendant in the present case properly asserted a limitation of liability defense in its answer to the complaint filed by MAPCO and that the trial court had jurisdiction to decide all the issues involved. There is, however, one problem with this conclusion. In both Langnes v. Green, supra and Ex parte Green, supra, the United States Supreme Court intimated that while the state courts do have jurisdiction to adjudicate the limitation of liability defense if asserted by a vessel owner in defensive pleadings, the state courts lack jurisdiction to determine if a vessel owner is entitled to limit his liability if the shipowner's right to limit liability is challenged by the claimant. See Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987), cert. denied 484 U.S. 953 (1988); Cincinnati Gas v. Abel, 533 F.2d 1001 (6th Cir.), cert. denied 429 U.S. 858 (1976).

The Supreme Court's decisions in Langnes and Ex parte Green were prior to the 1936 amendment to the Act, which instituted the six month limitation period for filing a Section 185 petition. Prior to the amendment, a petition to limit liability could be filed in federal court at any time after the loss occurred. Therefore, the Supreme Court, in holding that the state courts lacked jurisdiction to decide this issue once the right to limit liability was challenged, did not provide for a procedure whereby the vessel owner could get this issue before a federal court having the jurisdiction to hear it if the limitation of liability defense were raised in a state court proceeding after the six-month limitation period had run. Both the Fifth Circuit in Vatican Shrimp, and the Sixth Circuit in Cincinnati Gas held that in this situation the vessel owner is deprived of the right to limit liability since the state court lacks jurisdiction to decide the question of whether the owner has the right to a limited liability and the owner is precluded from getting this issue before federal court by means of a Section 185 petition because the statute of limitations has run.

We agree with the defendant that striking the defense and leaving them without a forum in which to assert the defense is a harsh result. This is especially so in light of the fact that the defendant could lose the availability of the defense even if the plaintiff's challenge to its availability is not based on fact and therefore frivolous. This result in seemingly in conflict with the Supreme Court's statement in Langnes v. Green, supra, that the state courts are "competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with the subject." Id. at 247. We find, however, that absent further direction from the Supreme Court, this is the only approach which is consistent with the statements in Langnes and Ex parte Green indicating that the state courts do not have jurisdiction to decide whether a vessel owner is entitled to limit his liability once that right has been challenged by the claimant. To limit the harshness of this result, however, we hold that since under the language of the statute, the only time the right to limit liability can be denied is when the loss occurred with the "privity or knowledge" of the owner,[2] the claimant in only

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[2] See The Linseed King, 282 U.S. 502, 510 (1932). The Supreme Court in Langnes v. Green, supra and Ex parte Green, supra, never clearly expressed what it meant by "a challenge to the right to limit liability" when it stated that the state court would lose jurisdiction "in the unlikely event that the right of a petitioner to limit liability might be brought into question." Langnes, 282 U.S. at 542. We believe that the only meaning which can plausibly be attributed to this "challenge to the right to limit liability" is that the claimant must be challenging the right to limit liability because of "privity and knowledge on the part of the vessel owner." In The Linseed King, supra, the Supreme Court stated that, "[t]he right to limit liability turns upon whether such negligence was within the owner's privity or knowledge." Furthermore, the meaning we attribute to this language is consistent with the language in the Green cases where the Court indicated that all other questions under the limitation of liability statute such as the value of

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entitled to have the limitation of liability defense struck if the challenge to the right to a limited liability is sufficiently based in fact as to be nonfrivolous.[3]

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[2] Continued

the vessel, are within the competence of the state courts. Langnes v. Green, 282 U.S. at 540, 543-44; Ex parte Green, 286 U.S. at 439. See also, 7A Moore's Federal Practice ¶F.03 ("non-maritime courts can decide all issues pertaining to the limitation defense except whether the defense is in fact available - i.e., whether the owner's knowledge is sufficient to make him fully accountable for the claimant's damage. Thus, if the right to limit is not contested, the state court having jurisdiction over the claim can establish the value of the vessel for limitation purposes and apply the substantive limitation principle by reducing any judgment that might be obtained to that value.")

[3] The approach we adopt today has been suggested by one of the leading commentators on federal court practice and procedure. "In fact, the right to assert the limitation defense does exist in any forum, state or federal, in which the plaintiff may commence his action. However, since the State Courts, and arguably even the federal district courts exercising their civil jurisdiction pursuant to the Savings Clause, lack the ability to resolve the limitation issue if challenged or to somehow certify or transfer that issue to a federal district court exercising its admiralty jurisdiction, that right can be rendered meaningless by the simple expedient of the claimant asserting that the vessel owner has no right to limit.

There is no discussion in the cases as to whether a challenge to the right to limit that is either patently frivolous, or which is made to appear frivolous after completion of discovery, can be stricken by the nonadmiralty court. If the issue of frivolity can only be determined by the admiralty and there is no mechanism for getting that issue before such a court, frivolous challenges to limitation defenses would be legally encouraged. Thus, it may well be that only challenges to the right to limit which have a sufficient basis in fact to overcome a 'frivolous' assertion will work to destroy the owner's limitation defense, and that the State courts are empowered to make that threshold determination." 7A Moore's Federal Practice, ¶F.03, note 51.

Applying our decision to the instant case, it appears that there is nothing in the record indicating that the plaintiff has ever challenged the defendant's right to a limitation of liability on anything other than jurisdictional grounds. We therefore remand the case to the Circuit Court to allow the defendant to proceed with its defense under the Limitation of Liability Act. If, in the Circuit Court, the plaintiff challenges the defendant's right to raise the defense because of privity and knowledge on the part of the vessel owner, it is in the discretion of the Circuit Court to determine whether there is a basis in fact for the challenge,[4] making it nonfrivolous. If the Circuit Court determines that the challenge is nonfrivolous, the defense must be struck because of a lack of jurisdiction to adjudicate that issue. If, however, the Circuit Court finds that there does not exist a basis in fact to challenge the availability of the limitation defense because of knowledge or privity, we hold that the Circuit Court does have jurisdiction to adjudicate the defendant's rights under the Limitation of Liability Act.

II.

Memphis Barge Line next argues that the trial court erroneously awarded MAPCO prejudgment interest on the portion of the stipulated damages award attributed to the cost of repairs not actually expended by MAPCO. The trial court awarded MAPCO prejudgment interest from the date of the accident to the date of the judgment at a rate of ten percent per annum on the $166,537.57 MAPCO actually spent on repairs and prejudgment

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[4] This determination will focus on whether MAPCO can produce any material evidence which will support a claim that any of Memphis Barge Lines "shore based high level management" was or should have been aware of the likelihood of the accident, before the ship's departure. See, Bankers Trust Co. v. Bethlehem Steel Corp., supra. If there is such evidence, the challenge is nonfrivolous.

interest at a rate of six percent per annum on the $523,462.63 attributable to the damages awarded for the cost of repairs that had not been made.

Under admiralty law a court generally awards prejudgment interest unless it finds extraordinary circumstances that would make the award inequitable. Phillips Petroleum Co. v. Stokes Oil Co., Inc., 863 F.2d 1250 (6th Cir. 1988); Inland Tuggs Co. v. Ohio River Co., 709 F.2d 1065 (6th Cir. 1983). Our review of the trial court's decision regarding the award of prejudgment interest is limited to whether the trial court abused its discretion in its award of prejudgment interest. Orduna S.A. v. Zen-noh Grain Corp., 913 F.2d 1149 (5th Cir. 1990); Federal Barge Lines, Inc. v. Republic Marine Inc., 616 F.2d 372 (8th Cir. 1990).

The courts are split on whether it is appropriate to award prejudgment interest on repair costs not actually expended. In Stevens v. The F/V BONNIE DOON, 655 F.2d 206 (9th Cir. 1981), the court held that it was inequitable to award prejudgment interest on sums not actually expended since the purpose of an award of prejudgment interest is to compensate for loss and not as a penalty. In Phillips Petroleum Co. v. Stocks Oil Co., Inc., supra, and Independent Bulk Transport v. Vessel "Morania ABACO", 676 F.2d 23 (2nd Cir. 1982), the courts held that a trial court could properly award prejudgment interest on money not actually expended, especially if certain factors were present, including the certainty of defendant's liability and the certainty of the amount of damages. Independent Bulk Transport, supra at 27.

In the present case we find that the trial court did not abuse its discretion in awarding MAPCO prejudgment interest on the $523,462.63 representing damages for repairs not actually made. The record reveals that there was apparently a high degree

of certainty as to the defendant's liability for the damage and the amount of damages since the parties were able to stipulate to both of these facts. Furthermore, the trial court reduced the punitive effect of its award by awarding interest on the sum not actually expended at a significantly lower rate than that apportioned for sums actually expended. Therefore, the judgment of the trial court with regard to the prejudgment interest award is affirmed. If on remand the trial court determines that the limitation defense is not available to the defendant, the trial court's award of $215,915.02 as prejudgment interest is to be reinstated.

For the foregoing reasons, the judgment of the trial court is affirmed as modified. The cause is remanded to the trial court for proceedings consistent with this opinion. Costs are taxed equally to the plaintiff and defendant.

(Signed) HIGHERS, J.

(Signed) TOMLIN, P.J., W.S.

(Signed) FARMER, J.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

MAPCO PETROLEUM, INC.,
Plaintiff/Appellee,
vs.
MEMPHIS BARGE LINE, INC.,
Defendant/Appellant.

SHELBY LAW NO.
02A01-9103-CV-00044

ORDER

This matter came on to be regularly considered by the Court on the record, and for the reasons stated in the Opinion of the Court, filed this date, it is ordered that:

1. The judgment of the trial court is affirmed as modified.

2. The cause is remanded to the trial court for proceedings consistent with this opinion.

3. Costs are adjudged equally to the plaintiff and defendant for which execution may issue, if necessary.

ENTERED OCT. 29, 1991

(Signed) HIGHERS, J.

(Signed) TOMLIN, P.J., W.S.

(Signed) FARMER, J.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

MAPCO PETROLEUM, INC.,
Plaintiff/Appellee,
vs.
MEMPHIS BARGE LINE, INC.,
Defendant/Appellant.

SHELBY LAW NO.
02A01-9103-CV-00044

ORDER

Plaintiff-Appellee has filed a petition to rehear in this case.

The petition argues a twofold premise for rehearing. First, it is asserted that we are bound by federal court decisions interpreting federal admiralty law and that we erred by deviating from Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987), and Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976). We note in the issues at hand, however, that the United States Supreme Court has addressed these matters and thus we are bound by our interpretation of that court's decisions rather than by holdings in the lower federal courts.

In the second place, it is alleged that our interpretation of Langnes v. Green, 282 U.S. 531 (1931), and Ex parte Green, 286 U.S. 487 (1932), was in error in that these cases held that if the state court claimant does not consent to state jurisdiction to adjudicate the Section 183 limitation defense, then the state court lacks subject matter jurisdiction over the limitation defense and is not empowered to determine whether the challenge has any basis in fact.

We reject the analysis that the Supreme Court in the Green cases was referring to subject matter jurisdiction. It is clearly the law that parties may not confer subject matter jurisdiction on a court by consent, appearance, or plea; neither can they waive subject matter jurisdiction requirements. Caton v. Pic-Walsh Freight Co., 364 S.W.2d 931 (1963); Felty v. Chillicothe Realty Co., 134 S.W.2d 153 (1939). We believe, therefore, that the Supreme Court was referring to situations where the state court can, in its discretion, refuse to exercise jurisdiction over a case. This interpretation is supported by the language of Langnes, wherein the court stated:

> [t]he state court, in the action there pending and in the due course of the exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject.
>
> . . . .
>
> Notwithstanding this however, the shipowner was free to evoke the jurisdiction of the federal district court; and that having been done the question which arose was not one of jurisdiction, but as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercise to dispose of the cause.

282 U.S. 540-41 (citations omitted).

Since under our holding the state court determines, within its discretion, whether to exercise jurisdiction over the claim under the Limitation of Liability Act, it is appropriate for the state court to decide whether the challenge has any basis in fact and is thus nonfrivolous.

For the reasons stated, the petition to rehear is denied.

So ordered this 27th day of November 1991.

(Signed) HIGHERS, J.

(Signed) TOMLIN, P.J., W.S.

(Signed) FARMER, J.

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL CIRCUIT AT MEMPHIS

MAPCO PETROLEUM,
Plaintiff
VS. NO. 21556
MEMPHIS BARGE LINE, INC.,
Defendant.

OPINION OF THE COURT

June 21, 1988

ALPHA REPORTING CORPORATION
Suite 1104 - 100 North Main Building
Memphis, Tennessee 38103
(901) 523-8974

PROCEEDINGS

(June 21, 1988)

(9:30 a.m.)

THE COURT: You all can just sit there if you want to and I'll just tell you. I'm not going to hear any arguments or anything else.

I've read all of these cases. I've reread them and read them again. It seems like to me I should have read this Cincinnati and the Vatican Shrimp cases earlier with the same intensity.

There's no question about it in my judgment they're controlling cases in this case. I don't like the law in them to be honest with you. I mean I don't even like what they hold, I think they're wrong, but that's not my decision. They've both been held by the Fifth and Sixth Circuits and also by—I think certiorari was denied in both cases by the Supreme Court.

So, I'll just read you the way I feel about it. In 1976 the Court of Appeals for the Sixth Circuit in the case of Cincinnati Gas and Electric, I'm not going to give the cites, you all have those I'm sure, posed the narrow question, may a ship owner who has been sued in a State Court for damages arising out of the operation of his vessel on navigable waters rely on the defense of limitation of liability under 46 U.S.C. 183 pled in his answer in State Court or must he file a petition for limitation in Federal District Court within six months after receiving notice of the claims provided in 46 185.

The Court answered the question by holding that if there's a contest to a State Court Answer seeking a limitation and if there's been no petition for limitation timely filed in a Federal District Court there can be no defense in the State Court action limiting liability under 46 183 80.

The Court went further to suggest to the legislature that if they were not in accord the law could be changed, and went further and suggested to the maritime defendants that they might easily avoid such a dilemma by petitioning the Federal Court for a limitation of liability upon receiving a notification of claim filed when it was filed as a complaint in a State Court.

Now, in other words, they said simply that if you're sued, if you're notified that there's a maritime claim against you and you want to limit your action you go into Federal Court and you say Federal Court, I want my action limited. Then you stand by it. If the suit's filed in Federal Court they'll join the limitation together with the lawsuit and they'll have a limitation defense.

If the suit's filed in State Court they can handle the limitation under the Federal Court because it's already in the Federal Court. But they can't transfer the case out of a State Court into the Federal Court just to hear the limitation of liability question. Anyhow, I'm going to strike the affirmative defense of limitation of action in this case.

Now, on the summary judgment, I know you all have got a matter over in Federal Court. As a matter of fact, during the Bar Association meeting I saw Judge Turner. I don't know what he's going to do or when he's going to act on it. I don't have any idea what he's going to do. He said as far as he was concerned I could go ahead and make my decision.

But there's no question in this case that there's been an admission of liability, in numerous instances in the defenses filed by the defendant in this case. All I'm going to do at the present time is just strike that Answer and let this case come on to be tried before a jury for determination.

I'm not going to find any admission of liability at this time even for the amount that it would appear from the pleadings that the defendant has admitted. They've admitted, apparently the value of the boat, it would appear to me they've admitted liability by the value of the boat, <u>but I'm just going to take that into consideration when and if there's any prejudgment interest involved.</u>

But for the present time I'm just going to let it come on for a trial by a jury on the total amount of damages and the limitation defense is out. All right.

Thank you. I won't give you any copies of anything. You all, I think you understand what I'm talking about. Take it up with Turner, if Turner's got anything he wants to tell me you all let me hear from him, but I'm not sure—I think he's reasonably in accordance with what I'm doing.

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT
MEMPHIS

MAPCO PETROLEUM, INC.,
Plaintiff,

vs.

NO. 21556-1 T.D.
JURY DEMANDED

MEMPHIS BARGE LINE, INC.,
Defendant.

ORDER ON PLAINTIFF'S MOTION TO STRIKE
AND FOR SUMMARY JUDGMENT

The action came on for hearing on the plaintiff's motion to strike from the defendant's answer the affirmative defenses predicated upon 46 U.S.C. §183 on the ground that said defenses fail to state a legal defense to the claim set forth in the plaintiff's complaint herein and the plaintiff's motion for summary judgment with respect to the issue of liability. Upon consideration of the entire record herein, the parties' legal memoranda and argument of counsel, it appears that the motion to strike should be granted and the motion for summary judgment should be denied.

It is therefore ordered that the plaintiff's motion be granted and the affirmative defenses predicated upon 46 U.S.C. §183 contained in the defendant's answer are stricken. It is further ordered that the plaintiff's motion for summary judgment with respect to liability be denied.

(Signed) JUDGE WYETH CHANDLER

DATE: 8 - 31 - 88

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEMPHIS BARGE LINE, INC.,
Plaintiff,
VS. NO. 88-2309-TUA
MAPCO PETROLEUM, INC.,
Defendant.

ORDER TO MOTION TO DISMISS

Plaintiff Memphis Barge Line, Inc. ("Memphis Barge"), filed a complaint pursuant to the provisions of 28 U.S.C. § 2201(a) against Mapco Petroleum, Inc. ("Mapco"), in which the plaintiff asks this court to declare and issue its judgment that Memphis Barge has the right under 46 U.S.C. § 183 to limit its liability for damage to the property of Mapco to the value of the vessel and her pending freight. Mapco has moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the basis that it is entitled to judgment as a matter of law.

It is alleged in the complaint that on the evening of December 7, 1986, that the M/V Sebring, an inland river towboat owned by Memphis Barge, pushing a three-barge tow, allided with a dock facility owned by Mapco. On December 8, 1986, Mapco notified Memphis Barge of its intention to make claim against Memphis Barge for damages sustained by the dock. On September 1, 1987, more than six months after Memphis Barge received notice of Mapco's intention to make claim, Mapco filed a complaint in the Circuit Court of Tennessee for the Thirtieth

Judicial District at Memphis claiming damages resulting from the allision in an amount exceeding $1,000,000. Memphis Barge filed an answer to the complaint and, among other defenses, asserted its right as owner of the M/V Sebring to limit its liability to the value of the vessel and her freight, allegedly $353,515.58. As a result of answers to interrogatories filed by Mapco, it became clear that Mapco contested the right of Memphis Barge to limit its liability under 46 U.S.C. § 183.

Section 183(a) provides in part that: "The liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. § 183(a). At the same time that section 183 was adopted by Congress, giving the owners of vessels limited liability protection in order to maintain their competitiveness with the shipping facilities of other countries, Congress also provided, in 46 U.S.C. § 185, that:

> It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

In addition to the procedures set forth by Congress in 46 U.S.C. § 185, which permitted a vessel owner to positively avail himself

of the limited liability provided by section 183, a body of law grew to recognize the owner's right to raise the defense provided by section 183 in answer to admiralty litigation filed against such owner. The Scotland, 105 U.S. 24, 34 (1881).

The question of whether or not the defense might be raised in state court was more problematic because admiralty jurisdiction is both exclusive to federal courts and, at times, concurrent with state courts. Title 28 U.S.C. § 1333 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333(1). Thus claimants wishing to pursue a maritime claim have two options available. They can bring a claim in federal court and invoke admiralty jurisdiction or, under the "saving to suitors" clause, the claimant can elect to bring his claim in state court or federal court, assuming subject matter jurisdiction, and have it proceed as an ordinary common law action. Both of these options carry with it certain advantages and disadvantages. An admiralty claim does not provide for a jury; a common law claim, while providing a jury, loses the procedural rights peculiar to a federal admiralty court.

The courts have recognized that the limitation of liability provided by 46 U.S.C. § 183 is a federal statutory right exclusively within the federal court's admiralty jurisdiction. Ex parte Green, 286 U.S. 437 (1932); Langnes v. Green, 282 U.S. 531 (1931); Metropolitan Redwood Lumber Co. v. Doe (The San Pedro), 223 U.S. 365 (1912); Norwich & New York Transp. Co. v. Wright, 80 U.S. (13 Wall) 104, 123-24 (1871); Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir.), cert. denied, 429

U.S. 858 (1976); In re Great Lakes Transit Corp., 63 F.2d 849 (6th Cir. 1933). The right is not one that existed at common law and thus was not saved "to suitors."[1]

In Langnes v. Green, the Supreme Court of the United States recognized that the question of the defendant owner's right to raise the issue of limitation of liability was not precluded by the fact that the action had initially been brought by claimant in state court. The Court held that the advantage of the limitations provided by § 4283 (a predecessor codification of 46 U.S.C. § 183(a)) may be obtained by a proper pleading. Langnes, 282 U.S. at 540. The Supreme Court noted that a state court is competent to entertain the limitation of liability claim and to afford relief under that statute in the exercise of its common law powers. Id. In overruling the lower court's grant of a restraining order precluding the entertainment of the limitation of liability claim by the state court, the Supreme Court noted the appropriateness of the federal court retaining jurisdiction in "the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court . . . ." Id. at 542. Thus, the Supreme Court, in effect, noted that where the defense of limitation of liability is not disputed, no issue arises and the state court is not precluded form granting relief under its common law powers, even though the judgment may be limited by stipulation in accord with the limitation of liability set up by the federal statute in admiralty. The Norco, 1 F. Supp. 932 (W.D. Wash. 1932).

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[1] A Case Note in 16 Journal of Maritime Law and Commerce 307, 310 (1988) disagrees stating that one is "simply wrong in saying that only a federal district court may decide that issue." The conclusion is based on an erroneous understanding of Langnes v. Green, 282 U.S. 531 (1931).

The fact that the state court did not have the power or jurisdiction to litigate the issue of the owner's claim to a limitation of liability was made clear in a further continuation of the Langnes case. In Ex parte Green, 286 U.S. 437 (1932), after remand, the claimant in the state court denied the defendant's assertion of limitation of liability and thus brought into issue the question of the defendant's right to that limitation under the federal admiralty statute. The Supreme Court, recognizing that the state court did not have the jurisdiction to entertain that issue, held that the federal court should proceed to decide the limitation of liability issue claimed by the defendant. Id. at 439-40.

Both the Langnes and the Green cases were decided prior to 1936 when Congress amended the statute now codified at 46 U.S.C. § 185 to provide:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of chapter 6 of title 48 of the Revised Statutes and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this Appendix, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to

> carry out the provisions of section 183 of this Appendix. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. app. § 185 (1988). The amendment was passed in response to practices of procrastination on the part of the owners in connection with proceedings under section 185. Such practices led to unnecessarily extended litigation in the state courts.

The plaintiff in this case, Memphis Barge, did not file under 46 U.S.C. § 185 within the six month period following its receipt of Mapco's notice of claim. Moreover, the plaintiff is especially careful in its complaint for declaratory judgment to assert:

> In asking this Court to declare its right to limit liability under 46 U.S.C. § 183, the plaintiff Memphis Barge Line, Inc. specifically does not file a complaint under the provisions of 46 U.S.C. § 185 .... That mechanism in 46 U.S.C. § 185 is not available to plaintiff because of the time limitation requiring that a concursus of claims be invoked within six months after notice of the first claim is received.

(Complaint at paragraph 12). By supplemental memorandum, this court has been informed that the state court has entertained Mapco's motion to strike the defense of limitation of liability for lack of subject matter jurisdiction and has granted that motion. Thus, if Memphis Barge is unsuccessful on this declaratory judgment suit, it will not be able to establish a limitation of liability.

In Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir.), cert. denied, 429 U.S. 858 (1976), the court stated that the only issue presented by the appeal then before it was:

> May a shipowner who has been sued in a state court for damages arising out of the operation of his vessel on navigable waters rely on a defense of limitation of liability under 46 U.S.C. § 183(a) pled in his answer in the state court proceedings or must he file a petition for limitation in a federal district court within six months after receiving notice of a claim as provided in 46 U.S.C. § 185?

Id. at 1001.

> Then Circuit Judge Lively, speaking for the panel, held:
>
> However, both the amendment to Section 185 and Rule F, supra, require that a petition be filed in a district court of the United States. Failure to so file within six months of written notice of a claim deprives the vessel owner of the benefits of limitation of liability.

Id. at 1005-06.

Plaintiff asserts: "[T]he Sixth Circuit panel did not have before it the issue of whether a vessel owner could rely on the limitation defense in section 183 pled in his answer in the state court proceeding." (Supp. Memorandum in Opposition to Motion to Dismiss Complaint, p. 5). Plaintiff would limit the issue in Cincinnati Gas to the simple question of whether a petition for limitation of liability under section 185 could be filed more than six months after receipt of notice of a claim. The plaintiff agrees

that the answer to that question was "no." Plaintiff, however, argues: "Cincinnati Gas did not hold that state courts do not have jurisdiction to entertain a claim of limitation pleaded under section 183 and to afford appropriate relief." Id. The basis for plaintiff's argument in this regard is the Langnes decision of the Supreme Court of the United States. The plaintiff argues that in this case: "The Supreme Court has made it absolutely clear that the state and federal courts have concurrent jurisdiction to entertain a shipowner's claim for limitation of liability under section 183 and to afford the owner the relief made available by that statute." Id.

After careful study, this court believes that the plaintiff has misconstrued the holding of Langnes. It is true that the Court did hold that a state court was "competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject." Langnes, 282 U.S. at 540. The decision in Ex parte Green, however, makes it clear that if the claim of limitation of liability is contested in the state court, the state court's jurisdiction is ousted and it does not have the power to determine that issue. In short, the Court held in Langnes that a state court is not precluded from imposing a judgment limited by the effects of the federal statute where the parties agree that the federal statute applies. When the application of the federal statute is at issue, however, the state court has no authority to decide the issue because jurisdiction is limited exclusively in the federal courts with respect to admiralty matters—such as the question of limitation of liability.

The issue drawn by the plaintiff's complaint is: Does Memphis Barge have the right, under 46 U.S.C. § 183, to limit its liability for damage to the Mapco dock facility to the value of the M/V Sebring and her pending freight? The answer to that issue,

given the asserted facts of the complaint, is no. Plaintiff in this case had two methods of asserting the defense of limitation of liability. The first was to file a petition under 46 U.S.C. § 185 within the six month period of limitation. the second was to assert the defense in an answer to the claim brought by Mapco in the hope or expectation that the plaintiff in the state court proceeding might stipulate that the provisions of section 183 governed and might be applied in the state court action. Where the stipulation is not forthcoming, the contest of the vessel owner's right to a limitation of liability ousts the state court of jurisdiction and precludes the vessel owner from maintaining a claim to limited liability unless the procedures authorized by 46 U.S.C. § 185 are employed.

Therefore, the question presented by the plaintiff's complaint falls back to the issue in Ex parte Green: May the vessel owner utilize the contested defense of limitation of liability as provided in 46 U.S.C. § 183 in defense of a state common law claim, given that the procedures authorized by 46 U.S.C. § 185 are not employed? Cincinnati Gas holds:

> [T]he only method available to CGE for invoking that jurisdiction [—admiralty jurisdiction—] was to follow the procedures prescribed by Section 185 and Supplemental Rule F for Admiralty and Maritime Claims which incorporates the six months requirement of Section 185.

533 F.2d at 1005. Unquestionably, plaintiff's right to a limitation of liability did at one time exist. It was not an unconditional right, however, and Memphis Barge having failed to avail itself of the statutory procedures provided to establish this right cannot now assert that it is entitled to the limitation without condition.

The only basis left to Memphis Barge to raise its claim to limited liability, given the forfeiture of the procedures provided in 46 U.S.C. § 185, is by way of answer in state court. Since state court does not have jurisdiction to determine the contested admiralty issue of limited liability, Memphis Barge no longer has a right to limited liability and is not, as a matter of law, entitled to the declaratory judgment sought.

Memphis Barge's complain is therefore dismissed.

IT IS SO ORDERED this 30th day of September, 1991.

_____

(Signed) JEROME TURNER
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

46 U.S.C. §183: Amount of Liability

(a) **Privity or knowledge of owner; limitation.** The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of the section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) Seagoing vessels; losses not covered in full. In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (1) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) Tonnage of seagoing vessels. For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such

tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) Loss of life or bodily injury arising on distinct occasions. The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) Privity imputed to owner. In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) "Seagoing vessel" defined. As used in subsections (b), (c), (d), and (e) of this section and in section 4283A [46 USCS Appx §183b], the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript nonself-propelled, even though the same may be seagoing vessels within the meaning of such term as used in section 4289 of this chapter, as amended [46 USCS Appx §188].

46 U.S.C. §185: Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended [46 USCS Appx §183], or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fax as necessary to carry out the provisions of section 4283, as amended [46 USCS Appx §183]. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

28 U.S.C. §1331: Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

U.S. Constitution, Art. III, §2, c1.1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,--—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;--—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Constitution, Art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

NO. 92-1824

In the Supreme Court of the United States

OCTOBER TERM, 1993

MAPCO PETROLEUM, INC.
Petitioner

versus

MEMPHIS BARGE LINE, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MACHALE A. MILLER
MARVA JO WYATT
O'NEIL, EICHIN, MILLER
& BRECKINRIDGE
One Poydras Plaza, 26th Floor
New Orleans, Louisiana 70113
504/525-3200

ATTORNEYS FOR
DEFENDANTS-RESPONDENTS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Whether the Supreme Court of Tennessee correctly concluded that when exercising its concurrent jurisdiction over an admiralty and maritime matter pursuant to the Saving to Suitors Clause and 28 U.S.C. § 1333, a state court is empowered, has jurisdiction and is obliged to decide the merits of the affirmative defense of limitation of liability created in 46 U.S.C. § 183.

QUESTION NO. 2

Whether a state court exercising the concurrent jurisdiction granted by the Saving to Suitors Clause and 28 U.S.C. § 1333 is bound to follow erroneous *obiter dictum* of lower federal courts as mandatory authority.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Statutes Applicable to the Case viii

Statement of the Case 1

Summary of Argument 5

Argument 7

Conclusion 29

TABLE OF AUTHORITIES

CASES **Page**

Asarco, Inc. v. Kadish, 490 U.S. 605 (1989) 29

In re Bayview Charter Boats, Inc. 692 F. Supp. 1480 (E.D.N.Y. 1988) 8,22,23

Brinson & Kramer v. Norfolk S.R. Co., 86 S.E. 371, 373 (N.C. 1915) 7

Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922) 13. 19

Chesapeake & Ohio Railway Co. v. Martin, 283 U.S. 209 (1931) 27, 28

Complaint of Okeanos Ocean Research Foundation, Inc., 704 F. Supp. 412, 413-14 (S.D.N.Y. 1989) 16

The CHICKIE, 141 F.2d 80 (3d Cir.1944) 8,14,16,26

Cincinnati Gas & Electric Co. v. Abel, 533 F.2d 1001 (6th Cir. 1976), *cert. denied* 429 U.S. 858 1976) . . . . . *passim*

Cooper v. Allison, 412 P.2d 356 (Ore. 1966) 19

In re Cooper/T. Smith Stevedoring Co., 753 F. Supp. 689 (E.D. La. 1990) 24

In re Dammers & Vanderheide, 836 F.2d 750 (2d Cir. 1988) 24

TABLE OF AUTHORITIES (continued)

CASES **Page**

Darrell v. Southern P.R. Co. 17 So. 884, 886-87 (La. 1895) 19

Deep Sea Tankers v. The Long Branch 704 F. Supp. 412, 413-14)S.D.N.Y. 1989) 16

Delaware River Ferry Co. v. Amos, 179 Fed. 756 (E.D. Pa. 1910) . . . . .

Evansville Veneer & Lumber Co. v. Claybon, 117 Ind. App. 499, 73 N.E. 2d 698 (1947) 19

Fishboats, Inc. v. Welzbacher, 413 So.2d 710 (Miss. 1982) 19

Ex Parte Green, 286 U.S. 437 (1932) . . . . . *passim*

Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992) 28

Galveston, H. & S.A.R. Co. v. Wallace, 223 U.S. 481, 490 (1912) 20

The GOLDEN TOUCH, 1967 A.M.C. 353 (R.I. Supreme Ct. 1966) *cert. denied* 226 A.2d 505, 1967 A.M.C. 356 7

Great Lakes Dredge & Dock Co. v. Lynch, 173 F.2d 281 (6th Cir. 1949) 23

TABLE OF AUTHORITIES (continued)

CASES **Page**

In re Great Lakes Transit Corp., 63 F.2d 849 (6th Cir. 1933) 24

Hathorn v. Lovorn, 457 U.S. 255 (1982) 20

Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867) 13

Jansson v. Swedish American Line, 185 F.2d 212 (1st Cir. 1950) 13

Jefferson Barracks Marine Service v. Casey, 673 F.2d 1007 (8th Cir. 1985) 23

Langnes v. Green, 282 U.S. 531 (1931) . . . . . *passim*

Larios v. Victory Carriers, Inc., 316 F.2d 62, 65 (2d Cir. 1963) 13

The Lotta, 150 Fed. 219, 222 (D.S.C. 1970) . . . . . .

Loughin v. McCaulley, 40 A. 1020 (Pa. 1898) 7

Malone v. A.L. Mechling Barge Lines, Inc., 380 N.E. 2d 497 (Ill. App. 1978) 19

The Moses Taylor, 71 U.S. 4 Wall) 411 (1867) 13

Murray v. New York Central Rwy. Co. 285 F.2d 152, 153-54 (2d Cir. *cert. denied* 366 U.S. 945 (1961) 7,8,16,27

TABLE OF AUTHORITIES (continued)

CASES **Page**

In re North Lubec Mfg. & Canning Co., 640 F. Supp. 639 (D.Me. 1986) 24

North Pacific S.S. Co. v. Industrial Acc. Comm'n of California, 174 Cas. 346, 163 P. 199, 203 (1917) 19

Ohio river Co. v. Carrillo, 754 F.2d 236 (7th Cir. 1985) 24

Ohio River Co. v. City of Wheeling, 225 F. Supp. 733 (N.D.W.Va. 1964) 23

Paladini v. Superior Court in and for City and County of San Francisco, 218 Cal. 114, 21 P.2d 941, 943 (1933) 19

Rojas v. Roban, 90 So.2d 58, 61 (S.Ct. La. (1956) 13

Scudero v. Todd Shipyards Corp., 385 P.2d 551 (Was. 1963) 13

Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164 (5th Cir. 1981) 7,14,16,26,27

In re S.S. American Trader, 616 F. Supp. 315 (S.D.N.Y. 1985) 23

State v. Daggett, 87 Wash. 253, 151 P. 648 (1915) 19

TABLE OF AUTHORITIES (continued)

CASES **Page**

State v. United States Fidelity and Guaranty Co. 24 P.2d 1037 1041 (Ore. 1933) 19

In re Tropigas Carriers, Inc., 603 F. Supp. 940 (S.D. Fla. 1985) 23

United States v. Reliable Transfer Co. 421 U.S. 397 (1975) 14

U.S. v. Crawley, 837 F.2d 291 (7th Cir. 1988) 28

U.S. v. Woods, 432 F.2d 1072, 1075 (7th Cir. 1970); *cert. denied*, 402 U.S. 983 (1971) 28

Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir.) *cert. denied*, 484 U.S. 953 (1987) . . . . . *passim*

MISCELLANEOUS

G. Gilmore & C. Black, *The Law of Admiralty*, (2d ed 1979) at p. 47 14

STATUTES APPLICABLE TO THE CASE

28 U.S.C. § 1333

The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 183

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purpose of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage; *Provided*, That there shall not be included in any such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent

or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, non-descript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

46 U.S.C. § 185

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefore, as the court may from time to time as necessary

to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefore, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vesssel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not

been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE

The principal issue presented to the court in MAPCO's Petiton For Writ of Certiorari is whether a plaintiff's exercise of its constitutional and statutory right to a state forum in an admiralty and maritime claim functions to deprive a defendant of its statutory right to the substantive defense of limited liability established by 46 U.S.C. § 183, thus altering the established rule that a state court, when hearing an admiralty and maritime claim, must apply general maritime law including all supplementary statutes. The second issue framed by MAPCO, namely whether a state supreme court must follow lower federal court *obiter dictum*, stems from MAPCO's failed attempt to transform unreasoned *dictum* into mandatory authority and then impose it upon Tennessee's high court. That court, quite rightly, refused to follow the unreasoned and erroneous *dictum* espoused in *Cincinnati Gas & Electric Co. v. Abel*, 533 F.2d 1001 (6th Cir.) *cert. denied*, 429 U.S. 858 (1976), and *Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5th Cir.) *cert. denied*, 484 U.S. 953 (1987), choosing instead to properly construe this Court's pronouncements in *Langnes v. Green*, 282 U.S. 531 (1931), and its companion case *Ex Parte Green*, 286 U.S. 437 (1932), and to conclude that the Tennessee courts are empowered to hear not only MAPCO's claim for damages but also Memphis Barge Line's limitation defense.

MAPCO correctly argues that Memphis Barge Line ("MBL") knew that MAPCO's damages potentially would exceed the value of MBL's interest in the vessel and her pending freight before the expiration of the six month period within which to convoke a concursus under 46 U.S.C. § 185. MBL also knew, however, that MAPCO would be the only potential claimant in such a proceeding. Accordingly, the concursus procedure afforded by 46 U.S.C. § 185 would have been an unnecessary waste of judicial resources because the § 185 concursus would accomplish no more or less than the injured party's state court suit. *Langness* and *Green*, when properly read and understood, do not compell such a result.

Langnes and *Green* arose in a unique procedural context that must be appreciated to understand the principle established therein. Those two cases involved a situation wherein a marine casualty caused only one injury. The injured party, exercising the option accorded by the Saving to Suitors Clause, filed suit in state court. The defendant-shipowner, exercising its option bestowed by 46 U.S.C. § 185, commenced a limitation proceeding in federal court. *Langnes* was decided prior to the 1936 amendment to § 185 which imposed a six month time limitation upon the § 185 concursus; in *Langnes* the vessel owner waited until the eve of the state court trial to convoke the § 185 concursus, thereby enjoining the nearly completed state suit. This Court's decision in *Langnes* was tailored to this particular procedural posture, and the Court concluded that because there was only one potential claimant to the limitation fund and because the state suit had proceeded almost to trial, the conflict between the plaintiff's right to a state forum under the Saving to Suitors Clause and the defendant's right to a § 185 concursus proceeding should be resolved by deferring to the plaintiff's choice of forum for its tort claim while still preserving the defendant's choice of forum for its limitation defense. In doing so, the *Langnes* Court stated:

> That the action brought in the state court was authorized by [the Saving to Suitors Clause], is plain. That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear...
>
> * * *
>
> The situation, then is that one statute gave respondent the right to a common-law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek

a limitation of liability in the federal District Court.

* * *

In this situation, while there is some conflict among the decisions of the lower courts, this court has accepted the view that, "in a state court, when there is only one possible claimant and one owner, the advantage of this section § 4283 (46 USCA § 183) may be obtained by proper pleading.

* * *

Upon the present record, the necessary result of this holding is that the state court, in the action there pending *and in the due course of the exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject.*

* * *

To retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a commonlaw remedy; to remit the cause to the state court would be to preserve the rights of both parties.

Langnes, 282 U.S. at 539-41.

The *Langnes* court was presented with conflicting interests—the injured party's right to proceed in state court, and the vessel owner's right to proceed by concursus in federal court. Because there was only one claimant, the vessel owner did not have a substantive need for a limitation action; thus opening the door for the *Langnes* Court's compromise. To effectuate this Solomonic solution, the *Langnes* Court ordered a dissolution of the federal court's restraining order (which was entered when the shipowner

commenced the § 185 concursus) but further ordered the federal court to retain jurisdiction over the shipowner's § 183 defense in order to accommodate the shipowner's statutory right, which arose upon its filing a § 185 proceeding, to have that defense determined in federal court. *Langnes* did *not* hold that under any circumstance *only* a federal district court was empowered to adjudicate a § 183 affirmative defense, but rather that a shipowner's choice of federal forum pursuant to § 185, like a plaintiff's choice of state forum pursuant to 28 U.S.C. § 1333, should not be disregarded if an effective compromise can accommodate both.[1]

The *Langnes* court ordered the federal district court to remand the plaintiff's damage suit to the state court with the caveat that the federal district court was to decide the vessel owner's limitation defense *if* plaintiff chose to contest it. Upon remand, the plaintiff (in defiance of the *Langnes* Court's prohibition) attempted to contest the vessel owner's right to limitation in the state court proceeding. The vessel owner then sought and was granted injunctive relief by the federal court thereby enjoining further prosecution of the state court suit.The plaintiff petitioned for a writ of mandamus, which was denied in *Green*, wherein the court stated:

> It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that, if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.[2]

It is this language from *Green* which, taken out of context,

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[1] *Langnes v. Green*, 282 U.S. 531, 541-43 (1931). That effective compromise is available only when there is but a single claimant so that the risk of the vessel owner defending multiple suits in multiple jurisdictions is nonexistent.

[2] *Ex Parte Green*, 286 U.S. 437, 439-40.

has spawned *Cincinnati Gas* and its ill-reasoned progeny. This statement about absence of jurisdiction does not and was not intended to establish a universal truth that a state court never has jurisdiction to decide the § 183 defense. This statement merely conveys the Court's Solomonic resolution of the conflict created when a single-claimant casualty results in a Saving-to-Suitor-Clause state court suit filed by the claimant and a § 185 concursus filed by the vessel owner in federal court.

The right to limit liability created by § 183 is a substantive right under federal maritime law. Section 185 creates a remedy — a means for enforcing this right in a concursus. It is irrelevant that at the time the Judiciary Act of 1789 was enacted there was no statutory right to limit liability — the same can be said of many other substantive admiralty statutes, such as the Jones Act, 46 U.S.C. § 688. The Saving to Suitors Clause does not speak in terms of rights but rather in terms of remedies — a dispositive distinction.

SUMMARY OF ARGUMENT

The Tennessee Supreme Court correctly determined that the Saving to Suitors Clause confers concurrent jurisdiction over not only MAPCO's cause of action for damages arising from a maritime tort but also MBL's statutory affirmative defense to that cause of action. The Tennessee Supreme Court began its analysis by accepting MAPCO's initial premise that Article III, Section 2 of the U.S. Constitution vests admiralty and maritime jurisdiction in the federal courts. That court however rejected the untenable conclusion which MAPCO seeks to extract from this premise, *i.e.*, that while the state courts have concurrent jurisdiction to adjudicate MAPCO's claim, they are not empowered to adjudicate MBL's affirmative defense of limitation conferred by § 183. Instead, the Tennessee Supreme Court, after reviewing §§ 183 and 185, studying the *Langnes-Green* principle, and applying basic principles of federalism, concluded that a state court is empowered and indeed obliged to decide MBL's limitation defense on its merits. The Tennessee Supreme Court predicated that

conclusion upon the following uncontrovertible considerations:

1. MAPCO's state court action was commenced under the auspices of the Saving to Suitors Clause.

2. A state court, when deciding such a case, is obliged to apply general maritime law, and, in any event, is always obliged to apply applicable federal statutes.

3. General maritime law consists of authoritative court decisions and supplementary acts of Congress.

4. The limitation defense of 46 U.S.C. § 183 is a substantive provision that supplements general maritime law and is an applicable federal statute.

5. 46 U.S.C. § 185 merely affords a vessel owner a procedural option — upon being sued in state court the vessel has alternate courses of action: (a) defend the state court action, or (b) file a § 185 action in federal court and obtain a stay of the state court action.

6. The substantive § 183 defense may be asserted defensively by pleading it as an affirmative defense to the injured claimant's suit or offensively by commencing a § 185 action, asserting the defense and obtaining a stay of all other suits.

7. Whereas § 185 limits the jurisdiction in which the concursus may be filed (the appropriate federal district court), § 183 significantly contains no jurisdictional restriction.

8. The *Langnes-Green* principle of exclusive federal jurisdiction has a narrow scope and is restricted to a situation wherein the vessel owner files a § 185 concursus action in response to a claimant's state court action under the Saving to Suitors Clause and wherein only one party was injured so that the vessel owner does not need a § 185 concursus to protect it against multiple suits.

10. MAPCO is the sole injured party, and MBL chose to forego the time-consuming and costly filing of an unnecessary § 185 concursus instead opting to defend the state court action and have its § 183 substantive defense

resolved by the Tennessee court, so that the conflict of rights that engendered the *Langnes-Green* Solomonic solution never arose.

This Court's decisions in *Langnes* and *Green* do not squarely address the issue of the scope of concurrent jurisdiction conferred by 28 U.S.C. § 1333. Instead, they address the interface between a vessel owner's § 185 concursus remedy and a tort claimant's state law remedy. *Cincinnati Gas* and *Vatican Shrimp* did not decide the issue presented here, namely whether the concurrent jurisdiction granted to the states by 28 U.S.C. § 1333 includes the right to decide the affirmative defense of limitation of liability. The *dictum* expressed in *Cincinnati Gas* and *Vatican Shrimp* demonstrates why *dictum* is accorded no precedential weight.

The majority of state high courts which have considered the issue have correctly concluded that the state courts are empowered to adjudicate a § 183 limitation defense. *Brinson & Kramer v. Norfolk S.R. Co.*, 86 S.E. 371, 373 (N.C. 1915); *Loughin v. McCaulley*, 40 A. 1020 (Pa. 1898); The *GOLDEN TOUCH*, 1967 A.M.C. 353 (R.I. 1966) *cert. denied* 226 A.2d 505, 1967 A.M.C. 356. These courts and now the Tennessee Supreme Court, in a well-reasoned decision, have correctly interpreted § 183 and have correctly read *Langnes* and *Green*. MAPCO's petition should be denied.

ARGUMENT

MAPCO contends that the exercise of its Saving-to-Suitors choice of forum divests MBL of its limitation defense.[3] MAPCO has failed to articulate a rationale for such an anomalous elevation of form over substance, instead dogmatically insisting that the Tennessee courts

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[3] The argument essentially seeks to bootstrap the temporal and jurisdictional constraints of the Section 185, concursus remedy into the substantive Section 183, 46 U.S.C. § 183, defense — which is not similarly temporally and jurisdictionally constrained. *See, e.g. Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981); *Murray v. New York*

must blindly follow unsupportable *dictum* in *Cincinnati Gas* and *Vatican Shrimp*. MAPCO's inability to present a convincing analysis forced it to argue to the Tennessee courts that they could not question *Cincinnati Gas* and *Vatican Shrimp*.

MAPCO sold this argument to a dismayed state district court,[4] who felt constrained to follow *Cincinnati Gas* and *Vatican Shrimp* even though he stated, "I don't like the law in them . . . I think they're wrong."[5] The Tennessee court of appeals likewise concluded it was bound to follow *Cincinnati Gas* and progeny,[6] but remanded the case to Judge Chandler to determine whether MAPCO's opposition to MBL's limitation defense "is sufficiently based in fact as to be nonfrivolous."[7] The appellate court's equitable (but improper) solution was based upon its erroneous reading of *Langnes* and *Green:*

> We agree with the defendant that striking the defense and leaving them without a forum in

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(footnote 3 continued)

Central Rwy Co., 285 F.2d 152, 153-54 (2d Cir.) *cert. denied* 366 U.S. 945 (1961); The *CHICKIE*, 141 F.2d 80, 84 (3d cir. 1944).

[4] Honorable Wyeth Chandler of Tennessee's Thirtieth Judicial District presided over the case in the district court. His oral reasons appear as Appendix C to MAPCO's petition.

[5] Judge Chandler's oral reasons are attached as Appendix C to MAPO's petition:

> There's no question about it in my judgement they're controlling cases in this case. I don't like the law in them to be honest with you. I mean I don't even like what they hold, I think they're wrong, but that's not my decision.

[6] A number of lower federal courts have repeated the *dictum* in *Cincinnati Gas* without analysis, but the Court should note that each such case will be found in the same procedural context as *Langnes* and *Green* and is thus not applicable, as will be discussed hereinabove. *See, e.g., In re Bayview Charter Boats, Inc.*, 692 F.Supp. 1480 (E.D.N.Y. 1988).

[7] Opinion of Court of Appeals of Tennessee Western Section at Jackson, attached as Appendix B to MAPCO's petiton at B-8.

> which to assert the defense *is* a harsh result. This is especially so in light of the fact that the defendant could lose the availability of the defense even if the plaintiff's challenge to its availability is not based on fact and [is] therefore frivolous. This result is seemingly in conflict with the Supreme Court's statement in *Langnes v. Green, supra,* that the state courts are "competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with the subject." *Id.* at 247. We find, however, that absent further direction from the Supreme Court, this is the only approach which is consistent with the statements in *Langnes* and *Ex Parte Green* indicating that the state courts do not have jurisdiction to decide whether a vessel owner is entitled to limit his liability once that right has been challenged by the claimant.[8]

The Tennessee appellate court failed to discern the distinct and unique procedural context of *Langnes* and *Green*, and this difference is dispositive. The Tennessee Supreme Court fully understood the distinction:

> Significantly, the Court in *Langnes* and *Ex Parte Green* did not hold that where, as in the instant case, the vessel owner elects to proceed with its limitation defense as an affirmative defense in the state court action instead of filing a Section 185 petition in federal court, the state court does not have subject matter jurisdiction. Read together, *Langnes* and *Ex Parte Green* hold only that when the injured party sues in state court *and the vessel owner responds by filing a Section 185 petition in federal court,* the federal court has jurisdiction. The difference between *Langnes* and *Ex Parte Green* and the instant case is that MBL did not file a Section 185 petition in federal court —

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[8] Opinion of Court of Appeals, MAPCO Appendix B, B-7.

unlike the vessel owner in *Langnes*.[9]

Langnes and *Green* do not hold that when a defendant-vessel owner pleads § 183 limitation as an affirmative defense in a state court action and elects to forego a § 185 proceeding, the state court is not competent and has no jurisdiction to adjudicate the merits of the § 183 defense. That situation was not presented in *Langnes* and *Green* — instead the vessel owner filed a § 185 proceeding in federal court seeking a stay of the state court action. *Langnes* and *Green* hold only that in the specific situation wherein (1) the injured party elects to proceed in state court and (2) the vessel owner, instead of asserting § 183 as an affirmative defense in that state court proceeding, elects, as is its right, to assert the § 183 substantive defense in a § 185 proceeding, the federal court then *and only then* acquires exclusive jurisdiction to hear the § 183 defense.[10]

Langnes and *Green* were not squarely presented with the question of whether a state court should hear a § 183 limitation defense when a § 185 federal court proceeding is not pending, because indeed a § 185 proceeding was underway. *Langnes*, nevertheless, during the course of syllogistically analyzing competency of state courts to decide a § 183 defense concluded that indeed a state court should do so. In that regard, *Langnes* expressly observed

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[9] Tennessee Supreme Court Opinion, MAPCO Appendix A, at A-9 (emphasis supplied).

[10] In *Langnes* the defendant-shipowner did *not* plead limitation as an affirmative defense in the state court action. In the instant case, MBL exercised its option and elected to assert the Section 183 substantive limitation defense in MAPCO's state court proceeding. In *Cincinnati Gas* and *Vatican Shrimp* the defendant-shipowners plead limitation as an affirmative defense in the state court actions; and, when the plaintiffs contested the vessel owner's right to limit on the basis of the presence of privity and knowledge, the defendant-shipowners, based upon a complete misreading of *Langnes* and *Green*, erroneously, indeed foolishly, conceded that the state court was ousted of jurisdiction to hear the § 183 limitation defense. MBL should not be penalized for other vessel owners' misappreciation of the law.

that "the advantage of this section [... 46 U.S.C. § 183] may be obtained by proper pleading" and that "the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and *afford him appropriate relief under the statute dealing with that subject.*" 282 U.S. at 540 (emphasis supplied). This pronouncement is consistent with the basic principle that state courts not only may but must enforce federal statutes. The only reason *Langnes* did not allow the state court to decide the § 183 defense is because the filing of the § 185 proceeding deprived the state court of all jurisdiction and, purely as an equitable and practical response to the situation, the *Langnes* court restored, but on a restricted basis, the state court's jurisdiction, conferring the narrow power to decide liability but not limitation.

Indeed, as previously mentioned, § 183 imposes no jurisdictional constraints upon its assertion, whereas § 185 does. This clear-cut distinction in statutory language mandates a clear-cut distinction in treatment — the § 183 defense, in accordance with basic principles of federalism, can be asserted and resolved in either federal or state court at the vessel owner's option; whereas a § 185 petition, by its express enabling language, accords the appropriate federal district court exclusive jurisdiction over the limitation proceeding and thus may be commenced and prosecuted only in federal court. Indeed, the language difference between §§ 183 and 185, wherein the former contains no jurisdictional constraint and the latter does, fully supports the above-quoted statement in *Langnes* establishing that the state court is competent to decide the § 183 defense. To repeat, only when the vessel owner invokes exclusive federal jurisdiction over the entire controversy by filing a § 185 action does a state court lose jurisdiction.

Cincinnati Gas and *Vatican Shrimp* address solely the narrow legal issue of whether the six-month time limitation for commencing a § 185 petition in federal court is

tolled or interrupted by the vessel owner's pleading the § 183 limitation defense within the applicable six month interval in the plaintiff-injured party's state court action. Both courts simply held that pleading the § 183 limitation defense in the state court action did not toll the six-month time limit in § 185 so that the vessel owner's federal court § 185 petition was not timely commenced. Both courts and all parties to those two proceedings assumed (rather blithely and certainly erroneously) that, as a consequence, the vessel owner had no means of having its § 183 substantive limitation defense heard. That question, however, was not addressed to either of the two federal appellate courts and moreover could only be addressed to the state courts, because the issue, as a matter of *ratio decidendi,* can only arise in a state court action.[11] Unfortunately, the vessel owners in *Cincinnati Gas* and *Vatican Shrimp* failed to appreciate the jurisdictional distinction between § 183 and § 185 and erroneously conceded that the state court could not entertain the merits of the § 183 defense.

Cincinnati Gas and *Vatican Shrimp,* therefore, simply do not address the issues presented here. They do not involve the same procedural context. They are not worthy of any precedential value.

Admiralty Jurisdiction and the Saving-to-Suitors Clause

As previously mentioned, MAPCO was able to commence its admiralty suit in state court because of the exception to exclusive federal court jurisdiction granted by the Saving to Suitors Clause. An appreciation of the validity of the Tennessee Supreme Court's decision requires a discussion of the law applicable in a Saving-to-Suitors Clause matter and of the manner in which a state court should handle such an action. The origin of the Saving to Suitor's Clause rests in Article Section 9 of the U.S. Constitution as implemented in the Judiciary Act of 1789

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[11] Because the *Cincinnati Gas* and *Vatican Shrimp* actions were not commenced timely, the federal courts' jurisdiction did not vest, thus the federal courts could not enjoin or restrain the prosecution of the state court suits under Section 185.

wherein the United States Congress reserved unto the states jurisdiction over admiralty and maritime matters whenever the common law provided a remedy for the enforcement of substantive admiralty and maritime rights:

> [T]he district courts ... shall also have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.[12]

Subsequent judicial interpretation of saving-to-suitors concurrent jurisdiction has determined that the common law provides a remedy for *all* substantive admiralty and maritime rights except the cause of action against the vessel itself, which invokes the so-called *in rem* remedy.[13]

A state court, when hearing an admiralty claim under the Saving to Suitors Clause, must apply general maritime law. *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255 (1922); *Jansson v. Swedish American Line,* 185 F.2d 212 (1st Cir. 1950); *Rojas v. Roban,* 90 So.2d 58, 61 (La. 1956); *Scudero v. Todd Shipyards Corp.,* 385 P.2d 551 (Wash. 1963). For example, in *Larios v. Victory Carriers, Inc.,* 316 F.2d 62, 65 (2d Cir. 1963), the court, in referring to admiralty claims commenced both in state court under the Saving to Suitors Clause and in federal court on the "law side" under diversity of citizenship, held: "For it is now clear that the maritime law controls all 'substantive' issues in the disposition of maritime claims regardless of the form or forums of suit." Accordingly, when deciding a damage action in the exercise of its concurrent jurisdiction under the auspices of the Saving to Suitors Clause, a state court must apply federally-adopted general maritime law.

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[12] 1 Stat. 76-77.

[13] In any *in rem* action, the offending vessel is fictitiously personified as a legal entity. The vessel itself is made defendant and, if found liable, can be sold to pay the damages awarded. See *The Hine v. Trevor,* 71 U.S. (4 Wall.) 555 (1867); *The Moses Taylor,* 71 U.S. (4 Wall) 411 (1867).

General maritime law consists of decisional law and of supplementary statutes enacted by Congress. In conferring judicial power in admiralty cases, the constitution empowered Congress "to alter and supplement the general maritime law." As stated in G. Gilmore & Black, *The Law of Admiralty* (2d ed. 1979) at p. 47:

> Many statutes — some of great importance — have been passed in the exercise of this power. None, apparently, has ever been declared unconstitutional. Some have added to the judicial jurisdiction; some have changed or filled out substantive rules of maritime law; a few have added whole new chapters of law to the corpus.

The right to limit liability created by § 183 is a substantive admiralty and maritime right that may be asserted in an affirmative defense which itself is a common law remedy.[14] The § 183 defense, which is a supplementary statute, is part and parcel of the general maritime law. MAPCO in candor cannot contend that the state courts are not competent to enforce a garden-variety federal maritime law right such as, for example, proportionate fault, by way of an affirmative defense.[15] But this in effect *is* the very position it advances here, because limitation is likewise simply an affirmative defense. Yet by misreading *Langnes* and *Ex Parte Green*, MAPCO attempts to bootstrap the jurisdictional constraint of § 185 into § 183 in the face of black letter law which holds that § 185 is not the exclusive *remedy* to enforce the § 183 *right*.

MAPCO was able to bring its proceeding in the Tennessee state court under the Saving to Suitors Clause

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[14] *Signal Oil*, 654 F.2d at 1173; *The Chickie*, 141 F.2d at 84.

[15] The substantive federal maritime law rejects the notion that a plaintiff's contributory negligence operates as a complete bar to recovery and instead follows the rule of reducing recovery by his proportionate fault, which is plead as an affirmative defense. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

because Mapco sought only a common law remedy, *i.e.*, the issuance of an *in personam* judgment against MBL. In pleading its § 183 defense, MBL likewise seeks to resist that common law remedy with a common law remedy, *i.e.*, an affirmative defense. Nothing in § 183, the general maritime law, basic principles of federalism, equity, or common sense suggests that MBL cannot do so or that the Tennessee state court is not empowered to hear and decide that defense.

The Limitation of Liability Act: Section 183 Confers a Right; Section 185 Creates a Remedy

The Tennessee Supreme Court held that the concursus procedure statutorily created by § 185 is not the exclusive means for asserting the substantive right to limit liability conferred by § 183. In so holding, that court implicitly recognized the distinction between a right and a remedy.

The § 183 limitation defense is an *in personam* right created by federal statute. Those lower federal courts which have come to the untenable and erroneous conclusion that the § 183 right to limit may be enforced *but not adjudicated* by the state courts, evidently were confused by the fact that Congress jurisdictionally limited the § 185 concursus proceeding without similarly limiting the § 183 substantive defense. Yet, when § 185 is critically studied, it becomes apparent that it bestows exclusive federal jurisdiction over the concursus proceeding on the federal courts simply because only a federal court could effectively be empowered to enjoin the courts of other states or enter an extra-territorial order requiring all claimants to file their claims in the concursus.[16]

The Section 183 right to limit is the very defense that is asserted in a § 185 concursus procedure; but, to repeat, § 185 does not provide the exclusive means of asserting the § 183 right. In fact, when a casualty involves only one claimant, as here, there is no need to tender the *res* (or a bond

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[16] 46 U.S.C. § 185(b).

as substitute) into the custody of the court and convoke a concursus. The vessel owner is not exposed to the risk and expense of multiple suits proceeding in multiple forums—the concerns which make a concursus attractive. The vessel owner is adequately protected by defending the claimant's suit and pleading § 183 as a defense. When Section 183 is pled as an affirmative defense in the injured party's own suit no concursus is convoked, no limitation fund is required and the six month time limitation that restricts the filing of the § 185 petition does not apply.[17] The reason that these unique characteristics of the § 185 concursus procedure do not apply to § 183 is straightforward—Congress specially tailored the concursus remedy to fit its unique purpose and in doing so specifically limited that remedy both jurisdictionally and temporally.[18]

A Section 185 concursus is indistinguishable in effect from a declaratory judgment action. *See* 28 U.S.C. § 2201. Section 185 simply accords a vessel owner the right to commence a concursus proceeding seeking a declaration

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[17] *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d at 1173; *Murray v. New York Central R. Co.*, 285 F.2d 152, 153-54 (2nd Cir.) *cert. denied* 366 U.S. 945 (1961); *Deep Sea Tankers v. The Long Branch*, 258 F.2d 757, 772 (2d Cir. 1958); *The Chickie* (3d Cir. 1944).

[18] The temporal six-month limitation was not contained in the 1851 enactment of the Limitation Act, but rather was added in 1936 to counter an abuse which had developed:

> [A] vessel owner could institute a proceeding to limit liability at any time, even after the question of liability had been decided against him [citations omitted]. To curb this abuse in 1936 Congress amended Section 185 to provide that an owner must file a limitation petition within six months after receiving a "written notice of claim."

Complaint of Okeanos Ocean Research Foundation, Inc., 704 F.Supp. 412, 413-14 (S.D.N.Y. 1989) (footnotes omitted). Because the *defense* of limitation must, by its nature, be pleaded in answer to a complaint, it necessarily cannot be used in this dilatory and unjust fashion. Accordingly, Congress had no reason to impose a time bar on the Section 183 *defense*. Had Congress intended to include the six-month time limitation in § 183, it would have simply included it in that *substantive* provision so as to apply *any time* the right is invoked.

that the vessel owner is entitled to limit its liability pursuant to the affirmative defense of § 183.

State Courts, Sharing Concurrent Jurisdiction With Federal Courts, Can and Should Decide the Section 183 Defense

The issue before this Court is whether a state court is empowered to adjudicate the merits of the affirmative defense created by § 183. The unrestrictive language of § 183 (in stark contrast to the jurisdictionally and temporally restricted language of § 185) along with basic principles of federalism, controlling United States Supreme Court decisions and persuasive state court opinions, conjoin to compel the conslusion that the Tennessee courts are empowered to adjudicate MBL's § 183 defense.

Section 183 states in mandatory terms that the liability of a vessel owner for a casualty caused without privity or knowledge "shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[19] This statute, supplementing general maritime law, creates a right unfettered by jurisdictional restraints. Unless, therefore, § 183 itself either limits the forums in which it may be asserted or unless a § 185 concursus is the only proceeding available in which to assert the § 183 substantive right, then the courts of Tennessee are duty-bound not only to *enforce* an uncontested §183 affirmative defense but also to *adjudicate* a contested one.

Had Congress intended to limit the forums in which the right could be asserted, § 183 would have contained the same jurisdictional limitation that is found in § 185.[20] The plain meaning of § 183 reveals no such limit. No sentence, clause, phrase or word in § 183 even so much as intimates that its defense can be adjudicated only in a federal court

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[19] 46 U.S.C. § 183a.

[20] The jurisdictional limitation would then apply across the board, and it would have been unnecessary to repeat it in § 185.

and/or in a § 185 proceeding. Indeed, a comparison of §§ 183 and 185 discloses no such Congressional intent. Section 183, in creating the substantive defense, reflects no jurisdictional constraint whatsoever in full recognition that the vessel owner will need the defense in federal court actions commenced under 28 U.S.C. § 1333 or 28 U.S.C. § 740 and in state court actions filed under the Saving to Suitors Clause. Section 185, in establishing a purely procedural vehicle for a vessel owner to convoke a concursus when confronted with the prospect of defending multiple lawsuits in perhaps multiple jurisdictions as the result of a multiple injury casualty, in stark contrast to Section 183, contains a jurisdictional limitation. Indeed, a concursus remedy, to be effective, requires an accompanying order enjoining the filing and/or prosecution of individual claimants' suits in federal or state forums. The inclusion of a jurisdictional restraint in §185 renders its omission in § 185 poignant. When Congress intended to limit jurisdiction, it did so in unequivocal terms. It is therefore clear both linguistically and conceptually that the jurisdictional constraint of § 185 does not apply to § 183—linguistically, because § 183, unlike § 185, contains no jurisdictionsl constraint; conceptually, because the nature of a § 185 concursus remedy requires a jurisdictional constraint; whereas the nature of a § 183 substantive defense (coupled with the fact that an injured party has the option of filing in federal or state court) requires that the defense be unrestricted in that regard.

At this juncture, MBL would point out the illogic in the holdings of *Cincinnati Gas* and *Vatican Shrimp*. When § 183 is asserted as an affirmative defense, the vessel owner bears the burden of proving lack of privity or knowledge.[21] What difference, then, can it make for purposes of a court's jurisdiction (or lack thereof) that the plaintiff contests the affirmative defense? The simple answer is that it makes absolutely no difference. In fact,

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[21] Section 183 grants the vessel owner a qualified defense. Its liability can be limited only if the negligent act or omission that caused the injury occurred without the vessel owner's privity and knowledge.

the highest courts of at least four states have ruled that the state courts possess jurisdiction over the § 183 affirmative defense,[22] and numerous intermediate state courts have adjudicated the defense on its merits.[23]

The U.S. Supreme Court's decisions in *Carlisle Packing Co. v. Sandager*[24] and later in *Langnes* expressly state that § 183 may be properly plead as an affirmative defense in state court. In *Carlisle Packing* the court found that the shipowner waived the § 183 defense by failing to plead it in his answer, but in so ruling the court first decreed:

> In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading.

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[22] See supra note 14.

[23] *See, e.g., Fishboats, Inc. v. Welzbacher*, 413 So.2d 710 (Miss. 1982) (affirming trial judge's finding that owner had privity and knowledge of unseaworthy condition of vessel, and thus was not entitled to limit liability); *Darrel v. Southern P.R.Co.*, 17 So. 884, 886-87 (La. 1895) (denying limitation because shipowner had privity and knowledge of cause of casualty); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915)(State Workers' Compensation Board cannot award amount in excess of amount fixed by Limitation Act); *North Pacific S.S. Co. v. Industrial Acc. Comm'n of California*, 174 Cal. 346, 163 P. 199,203 (1917) ("Accident Commission would be duty bound to limit its award so that it would not exceed the [amount fixed by the Limitation of Liability Act]."); *Paladini v. Superior Court in and for City and County of San Francisco*, 218 Cal. 114, 21 P.2d 941, 943 (1933) ("The right of damage claimants to bring suits in the state court cannot, however, operate to deprive the vessel owners of the right guaranteed to them by act of Congress to limit their liability for losses comprehended within said act to the value of their respective interests in the vessel."); *Evansville Veneer & Lumber Co. v. Claybon*, 117 Ind. App. 499, 73 N.E. 2d 698 (1947) (remanded for factual finding of whether the vessel owner should prevail on its *defense* of limitation of liability); *State v. United States Fidelity & Guaranty Co.*, 24 P.2d 1037, 1041 (Ore. 1933) (denying limitation because the party asserting the right to limited liability was not the owner or charterer *pro hac vice*, as required by the Limitation Act — and in the process exercising jurisdiction to hear the limitation defense). Contra *Malone v. A.L. Mechling Barge Lines, Inc.*, 380 N.E. 2d 497 (Ill. App. 1978); *Cooper v. Allison*, 412 P.2d 356 (Ore. 1966).

[24] 259 U.S. 255 (1922).

In *Langnes* the court concluded that:

> [T]he state court, in an action there pending and in the due course of the exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject.[25]

On a fundamental level, basic principles of federalism dictate that a state court must apply a federally-created right. In *Hathorn v. Lovorn*, 457 U.S. 255 (1982), this Court declared that state courts are burdened with the duty—not merely vested with the option—to enforce federally-created rights in state court actions:

> If the Mississippi courts had the power to make this determination, then it is clear that they also had the duty to do so. "State courts, like federal courts, have a constitutional obligation ... to uphold federal law." 457 U.S. at 269.

The *Hathorn* court further stated:

> Only last Term we summarized the principles governing state court jurisdiction to decide federal issues. We begin, in every case, "with the presumption that state courts enjoy concurrent jurisdiction" over those claims. Only "an explicit statutory directive, [and] unmistakable implication from legislative history or ... a clear incompatibility between state-court jurisdiction and federal interests" will rebut the presumption. 457 U.S. at 266 (citations omitted).

See also *Galveston, H.&S.A.R. Co. v. Wallace*, 223 U.S. 481, 490 (1912), wherein this court stated that state courts have "the power to hear and determine causes of action created by Federal statute."

Despite these clear Supreme Court pronouncements,

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[25] 259 U.S. at 260.

the U.S. Fifth and Sixth Circuits, in *Vatican Shrimp* and *Cincinnati Gas,* respectively, have managed to misread *Langnes* and *Green* and spawn a number of erroneous decisions, which, like sheep in unthinking fashion, have merely followed the circuit courts' ill-reasoned lead.

MBL asks this Court to scrutinize *Cincinnati Gas* and *Vatican Shrimp.* In both, counsel for the vessel owner, inappreciative of the distinction between a § 185 remedy and a § 183 defense, *conceded* that the state court had no jurisdiction to adjudicate the § 183 defense.[26] The Fifth and Six Circuits' comments on the limits of a state court's jurisdiction over § 183 were *dictum,* and these two cases amply demonstrate why *dictum* is accorded so little precedential weight — it is devoid of adversarial exchange. *Langnes* and *Greene* do not say what *Cincinnati Gas* and *Vatican Shrimp* say they say. Moreover, they simply are not applicable to this case because MBL has not invoked a federal district court's § 185 concursus power.

***Langnes* and *Ex Parte Green* Do No Apply to This Case**

A thorough reading of *Langnes* and its follow-up *Green* will show that the two cases (like *Cincinnati Gas* and *Vatican Shrimp*) turn upon the fact that only a single claimant was injured in the casualty and the vessel owner had filed a § 185 concursus thus *depriving* the state court of jurisdiction by the express terms of the *statute.* The *Langnes* court recognized that differing interests were in conflict, thus requiring a balancing approach. The conflict naturally arises because an injured person has the right under the Saving to Suitors Clause to file its damage suit in state court and the shipowner has the right under § 185 to file a limitation action in federal court and have the state court action stayed. *See Langnes,* 282 U.S. at 539-41.

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[26] *See Cincinnati Gas,* 533 F.2d at 1002; *Vatican Shrimp,* 820 F.2d at 677. Although neither case expressly states this, a careful reading of the issues put to each court will reveal that in neither case did the defendant question whether the state could adjudicate the defense.

The Court in *Langnes*, recognizing that the need for a concursus was non-existent in a single-claimant dispute and that the shipowner had abused the procedure by filing its § 185 action two days before trial in the state court action, found an appropriate compromise to balance these competing interests. The Court lifted the § 185 injunction to allow the state court to decide the issue of liability while retaining jurisdiction in the federal court to hear the § 183 limitation defense, *if* the injured plaintiff contested the vessel owner-defendant's ability to limit.[27] In doing so, the Supreme Court was not pronouncing a universal rule that, as a matter of pure legal principle and statutory construction, should apply in all instances. Instead, the Court was adopting a compromise to accommodate competing rights in the narrow confines of the existing dispute (injured claimant's right to state court; vessel owner's right to concursus in federal court) wherein separate state and federal court actions were pending. Only as part of its Solomonic solution to these seemingly irreconcilable rights did the *Langnes* court issue its admonition to the plaintiff that *if* the plaintiff contested the shipowner's right to limit, the matter would return to federal court so that the § 185 petition could be heard.

The *Green* decision marked the return of the § 185 petition to federal court because the plaintiff contested the shipowner's right to limit. MAPCO simply misreads *Langnes* and *Greene* as creating the abstract, universal rule that a state court is never empowered to adjudicate the § 183 limitation defense. That restriction, however, applies only in the context of a single claimant casualty wherein the injured party wants to proceed in state court and the defendant-vessel owner wants to proceed in federal court.

MAPCO cites *In Re Bayview Charter Boats, Inc.*,

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[27] In other words, if the injured party should assert that the negligent act causing the claimant's injury was within the vessel owner's privity and knowledge so as to disentitle the vessel owner to the defense, then under the Court's compromise decree only the federal court could decide this issue.

692 F. Supp. 1480 (E.D.N.Y. 1988), and *Ohio River Co. v. City of Wheeling*, 225 F. Supp. 733 (N.D.W.Va. 1964), in support of its argument that state courts do not possess the requisite jurisdiction to adjudicate the § 183 affirmative defense. MBL urges this Court to study those cases carefully. Hasty consideration of authority, among other factors, has been responsible for much of the confusion and ill-reasoned *dictum* which has lead to the controversy now before this Court. Both *Bayview Charter* and *Ohio River Co.* are cases that observe, hastily and unthinkingly, that the federal court has exclusive jurisdiction to decide the § 183 affirmative defense. But *Bayview Charter* does so in the context of a pending § 185 concursus, so that the issue actually before the *Bayview* court was whether the § 185 concursus had been timely filed.[28] In *Ohio River Co.*[29] the shipowner filed a petition in federal court which the court held did not conform to the procedural requirements of § 185 and was beyond the six month time limitation. Indeed, counsel for the shipowner *stipulated* that the state court was divested of jurisdiction over its § 183 affirmative defense.[30] Neither case is like the instant one. MBL has *not* elected to commence a § 185 concursus so that the competing interests, the presence of which engendered the *Langnes/Green* compromise, are not present here. Accordingly, the general rule that a state court must apply a federal defense is not altered.

The other *federal* cases[31] cited by MAPCO all in-

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[28] *Bayview Charter*, 692 F. Supp. at 1481 ("*Bayview Charter Boats, Inc.* ... commenced this proceeding pursuant to 46 U.S.C. § 185 ... to limit its potenetial liability ....") *See also, In re S. S. American Trader*, 616 F. Supp. 315 (S.D.N.Y. 1985), involving the very same procedural context as *Bayview Charter*, with the court espousing similar *dicta*.

[29] 225 F. Supp. 733.

[30] 225 F. Supp. at 734.

[31] *Great Lakes Dredge & Dock Co. v. Lynch*, 173 F.2d 281 (6th Cir. 1949), *Jefferson Barracks Marine Service v. Casey*, 673 F.2d 1007 (8th Cir. 1985), *In re Tropigas Carriers, Inc.*, 603 F. Supp. 940 (S.D. Fla.

volve the same procedural posture as *Langnes* and its companion *Green*. In each the shipowner divested the state court of jurisdiction by invoking the § 185 concursus. MBL would ask that any lower *federal* court authority cited for the proposition that a *state* court does not have jurisdiction over § 185 be scrutinized — if the case is before a federal court, it probably will be there by virtue of a pending § 185 concursus proceeding. This single element distinguishes the present case from *Langnes, Green* and the lower federal authorities upon which MAPCO misinformedly relies. MBL has not filed a § 185 concursus so as to create the conflict that was addressed and solved in *Langnes* and *Green*. Accordingly, the basic rule that a state court must apply general maritime law including supplementary statutes applies.

MBL emphasizes that the Supreme Court in *Langnes* observed that, had the vessel owner elected to do so, it could have pled the § 183 limitation defense in the state court action and obtained a complete resolution of that defense on its merits in the state court proceeding:

> [T]his court has accepted the view that, in a state court, when there is only one possible claimant and one owner, the advantage of this section ... [46 USCA § 183 ...] may be obtained by proper pleading.
>
> Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under

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(footnote 31 continued)

1985), *Ohio River Company v. Carrillo*, 754 F.2d 236 (7th Cir. 1985), *In re North Lubec Mfg. & Canning Co.*, 640 F. Supp. 636 (D.Me. 1986), *In re Dammers & Vanderheide*, 836 F.2d 750 (2d Cir. 1988), *In re Cooper/T. Smith Stevedoring Co.*, 735 F. Supp. 689 (E.D. La. 1990) and *In re Great Lakes Transit Corp.* 63 F.2d 849 (6th Cir. 1933).

the statute dealing with that subject.[32]

MBL did just that.

MBL further emphasizes that the seemingly dogmatic pronouncement in *Green* that the state court had no jurisdiction to hear the § 183 defense must be considered in context. The *Green* Court made that statement in response to the injured plaintiff's refusal to honor the *Langnes* compromise by contesting the shipowner's right to limit in the state court action.

Applying the very principles upon which MBL relied in asserting its § 183 right by way of affirmative defense, the Supreme Court in *Langnes* hastened to add that the vessel owner was not obliged to assert its § 183 limitation defense in state court but could opt for the other procedural means of doing so by filing a § 185 petition in federal court and pleading the § 183 limitation defense in that proceeding:

> Notwithstanding this, however, the shipowner was free to invoke the jurisdiction of the federal District Court; and, that having been done, the question which arose was not one of jurisdiction, but as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the case.[33]

When viewed in its proper procedural context, then, it is evident that nothing in *Langnes* even so much as intimates that, as an absolute proposition of law, a state court under no circumstances is competent to hear a § 183 limitation defense. *Langnes* does not hold that where, as here, the vessel owner elects to proceed with its § 183 limitation defense as an affirmative defense in the state court action, the state court does not have jurisdiction.

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[32] 282 U.S. at 540 (citations omitted).

[33] *Id.* at 540-41 (citations omitted).

Langnes holds only that when the sole injured party sues in state court *and* the vessel owner responds by filing a § 185 petition in federal court, the federal court in the sound exercise of its jurisdiction should relinquish its jurisdiction over the liability phase of the case in deference to the injured party's right to trial by jury.

It bears emphasis that MBL, in accordance with *The Chickie* and *Signal Oil* decisions, had two equally viable means of asserting its limitation defense: (1) pleading it as an affirmative defense in MAPCO's Tennessee state court action; or (2) commencing its own § 185 limitation proceeding wherein, *inter alia*, liability and limitation would be heard — subject, of course, to federal trial judge's discretion to permit the previously filed state court action to proceed on the issue of liability. MBL chose the former, and, as a consequence, the conflict that spawned *Langnes* and *Ex Parte Green* never arose. MAPCO now advances the anomalous and bizarre proposition that the § 183 limitation defense can be asserted as an affirmative defense in a state court action but that, when and if the injured plaintiff contests the vessel owner's right to limit liability, the state court somehow mysteriously and inexplicably is ousted of jurisdiction to resolve these issues on the merits. And MAPCO urges that bizarre result even though basic principles of federalism mandate a state court to apply federal law, even though general maritime law including statutes must be applied by the state court in a Saving to Suitors Clause case and even though nothing in § 183 purports to alter these principles of federalism.

MBL Has Timely Asserted Its Affirmative Defense

MAPCO commenced suit approximately nine months after the casualty. MBL answered and asserted limitation of liability as an affirmative defense. The driving force of the present petition and the appeals below is really not a question of jurisdiction but a question of timeliness. MAPCO chose the state forum to adjudicate its claim for damages and has not once argued that a state court adjudication of MBL's right to limit would in some way

prejudice MAPCO's rights or limit MAPCO's ability to controvert the defense. On the contrary, MAPCO cites *Cincinnati Gas* and its *dictum*-borne progeny in an opportunistic effort to divest MBL of its statutory defense, before the merits are even heard. Indeed, MAPCO's initial choice of a state forum may have been motivated by this design.

Because MBL had no need to petition the federal court for a concusus, it was satisfied to assert its right to limit as an affirmative defense. The six month time limit found in and applicable to § 185 does not apply to § 183 when it is asserted as an affirmative defense, [34] so the six month time limit in § 185 passed without MBL's filing a concursus. The passage of six months merely extinguished MBL's right to file a § 185 concursus but in no way affected the timeliness of the assertion of a § 183 defense. Thereafter, had MAPCO commenced its suit in federal court, MBL unquestionably could have asserted limitation as an affirmative defense. The question, therefore, is whether MAPCO's choice of forum should alter this result. If so, the practical result will be to force shipowners to convoke a § 185 concursus *every time* the potential exists for limitation of liability to preserve the § 185 defense, *even* if there is only one potential claimant and the concursus procedure is unnecessary. Surely Congress could and would not have intended such an inefficient and unwieldy procedure.

The Tennessee Courts Were Not Bound To Follow Lower Federal Court *Obiter Dictum*

MAPCO correctly argues that a Supreme Court determination of a federal question is binding on the state courts.[35] This most fundamental aspect of federalism is

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[34] *Signal Oil*, 654 F.2d at 1173; *Murray*, 285 F.2d at 153-54; *The Long Brance*, 258 F.2d at 772.

[35] MAPCO Petition at 23 n.12, citing *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 221 (1931).

premised upon the Supremacy Clause of the U.S. Constitution,[36] from which the Supreme Court's appellate jurisdiction over the state court is derived.[37] Lower federal courts, on the other hand, exercise no appellate jurisdiction over the state courts, and therefore their decisions do not constitute mandatory authority.[38] Indeed, the relationship between the state and lower federal courts has been described in terms of "a parallelism . . . [without] paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court."[39] MAPCO cites *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209 (1931), in support of the proposition that "[t]he Tennessee Supreme Court was required to follow *Vatican Shrimp* and *Cincinnati Gas.*"[40] Yet *Chesapeake & Ohio Railway* simply holds that the state courts are bound to follow Supreme Court — not lower federal court — precedent.[41] MAPCO can muster no authority for the untenable premise that the Tennessee Supreme Court was bound to follow lower federal court holdings much less *obiter dictum* that is demonstrably wrong.[42] Indeed, the Tennessee high court was duty-bound to follow this Court's precedent in *Langnes* and *Green* to the extent this prece-

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[36] U.S. Const. Art. VI, cl.2.

[37] *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) *quoting U.S. v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970); *cert. denied*, 402 U.S. 983 (1971).

[38] *U.S. v. Woods*, 432 F.2d at 1076.

[39] *Freeman*, 962 F.2d at 1258 *quoting Woods*, 432 F.2d at 1075.

[40] MAPCO Petition at pp. 21-22.

[41] *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 221 (1931).

[42] *See U.S. v. Crawley*, 837 F.2d 291 (7th Cir. 1988) for an excellent explanation of why *dictum* has no binding precedential effect.

dent applied, and the duty to follow necessarily entails the duty to interpret.[43] Indeed, this Court in *Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989), expressed complete confidence in the competency of state courts:

> [S]tate courts...possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

490 U.S. at 617.

The power of the state courts to interpret federal law, recognized in *Asarco*, should not be emasculated by devotion to MAPCO's notion that state courts must blindly follow *obiter dictum*, even when, as here, the state court recognizes that the *dictum* is wrong.

CONCLUSION

The Tennessee Supreme court correctly interpreted this Court's decisions in *Langnes* and *Green*, concluding that the Tennessee courts are empowered not only to enforce but also to adjudicate the § 183 limitation defense. The Section 185 concursus is not the only means for asserting limitation of liability, and when asserted as an affirmative defense the six month time limitation does not apply. MBL's affirmative defense is well founded and should be decided on its merits. Accordingly, MAPCO's petition should be denied.

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[43] *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982) ("State courts, like federal courts, have a constitutional obligation. . .to uphold federal law.")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1993, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails, properly addressed to his, her or its counsel of record, first class postage prepaid.

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MACHALE A. MILLER